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ABSTRACT

This report evaluates the Civil Rights activities of four federal agencies considered to have major responsibilities for ensuring equal employment opportunity. It is the fifth of a series of seven reports to be issued by the U.S. Commission on Civil Rights describing the structure, mechanisms, and procedures used by the federal departments and agencies in their efforts to end discrimination against this nation's minority and female citizens. Among the general findings and conclusions of the report are the following. It is held that the federal effort to end employment discrimination has not been equal to the task; that there is no one person, agency, or institution which can speak for the federal government in this important area; existing civil rights laws were weakened as a result of political compromises and do not provide an adequate framework within which federal agencies can operate; that the diffusion of authority for enforcement of equal employment mandates is one of the key reasons for failure of the government to mount a coherent attack on employment discrimination; and that efforts to coordinate the overall federal effort have been most discouraging. Specific findings are detailed in a section categorized according to department. An addendum to the main report focuses on the response of the Department of Labor to the contents of the report and the comments of the Commission on Civil Rights to that response. (Author/JM)

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THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974

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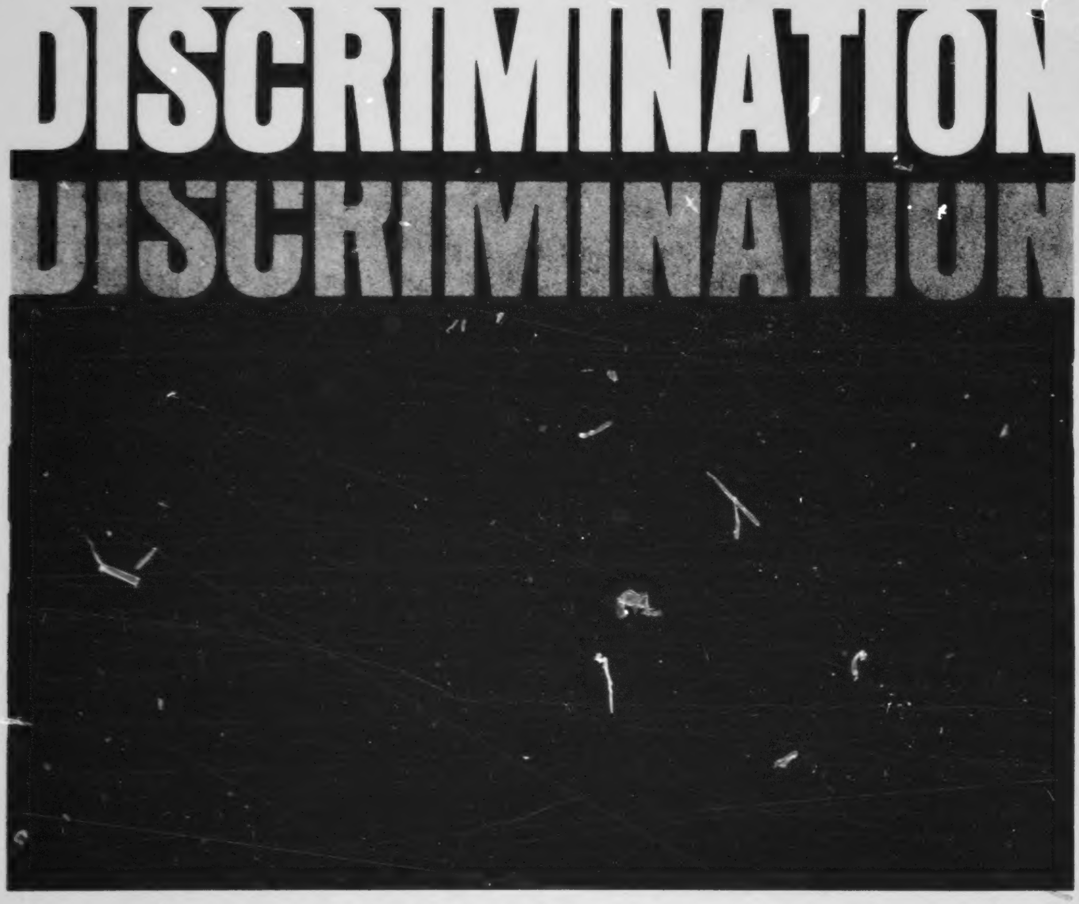
Volume V

To Eliminate Employment Discrimination



A Report of the United States Commission on Civil Rights July 1975

UD 015350

U.S. COMMISSION ON CIVIL RIGHTS

The United States Commission on Civil Rights is a temporary, independent, bipartisan agency established by the Congress in 1957 to:

- Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and
- Submit reports, findings, and recommendations to the President and Congress.

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LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C., JULY 1975

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The U.S. Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended.

This report evaluates the civil rights activities of most Federal agencies with major responsibilities for ensuring equal employment opportunity: the Civil Service Commission, the Department of Labor, the Equal Employment Opportunity Commission, and the Equal Employment Opportunity Coordinating Council. It is the fifth in a series of seven reports to be issued by this Commission describing the structure, mechanisms, and procedures utilized by the Federal departments and agencies in their efforts to end discrimination against this Nation's minority and female citizens. This series of publications represents our fourth followup to a September 1970 study of the Federal civil rights enforcement effort.

This report is based on a review of documents produced by these agencies, interviews with Federal officials, and an analysis of available literature. A draft of this report was submitted to the agencies for review and comment prior to publication.

We have concluded in this report that although there has been progress in the last decade the Federal effort to end employment discrimination based on sex, race, and ethnicity is fundamentally inadequate. It suffers from a number of important deficiencies including lack of overall leadership and direction, the diffusion of responsibility to a number of agencies, the existence of inconsistent policies and standards, the absence of joint investigative or enforcement strategies, and the failure of the agencies covered in this report to develop strong compliance programs.

We believe that the Federal Government's experience over the years in this area of law enforcement has established conclusively that basic elements of fairness and efficiency will be best served by one enforcement agency applying one standard of compliance. Therefore, we recommend that the President propose and the Congress enact legislation consolidating all Federal equal employment enforcement responsibilities in a new agency, the National Employment Rights Board. The Board should enforce one law prohibiting employment discrimination on the basis of race, color, religion, sex, national origin, age, and handicapped status. We urge that the Board be granted administrative, as well as litigative, authority to eliminate discriminatory employment practices in the United States. The Board, which would not be reliant upon the receipt of complaints to act, should be allocated, at a minimum, resources equivalent to one and a half times those currently provided in the Federal equal employment effort.

Employment discrimination is a matter of paramount concern in this country today. It impedes the equitable delivery of services by public and private institutions, and it prevents minorities and women from competing economically in our society. As a result it also limits housing and educational opportunities. Of fundamental importance is the damage it causes the self-respect of those adversely affected. To overcome this ingrained problem requires a bold new approach such as the one which we have suggested. We have recommended interim steps to be taken by each of the agencies until a reorganized enforcement program is developed.

We urge your consideration of the facts presented and ask for your leadership in ensuring implementation of the recommendations made.

Respectfully,

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Robert S. Rankin
Manuel Ruiz, Jr.
Murray Saltzman

John A. Buggs, Staff Director

THE FEDERAL CIVIL RIGHTS
ENFORCEMENT EFFORT--1974

Volume V

To Eliminate Employment Discrimination

A Report of the United States
Commission on Civil Rights
July 1975

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PREFACE

In October 1970 the Commission published its first across-the-board evaluation of the Federal Government's effort to end discrimination against American minorities. That report, The Federal Civil Rights Enforcement Effort, was followed by three reports, in May 1971, November 1971, and January 1973, which summarized the civil rights steps taken by the Government since the original report. The Commission is presently in the process of releasing its most comprehensive analysis of Federal civil rights programs. We have already published the first four volumes of that study: the first on the regulatory agencies, the second on agencies with fair housing responsibilities, the third on the agencies concerned with equal educational opportunity, and the fourth on the Office of Revenue Sharing of the Department of the Treasury. In the next few months we will publish reports on Federal civil rights efforts in the areas of federally-assisted programs and policymaking.

This civil rights enforcement study was begun in November 1972. As we have done with all previous Commission studies of the Federal enforcement effort, detailed questionnaires were sent to agencies, extensive interviewing of Washington-based civil rights officials took place, and a vast number of documents were reviewed, including laws, regulations, agency handbooks and guidelines, compliance review reports, and books and reports authored by leading civil rights scholars. Volumes of data were also analyzed from sources including the census, agency data banks, complaint investigations, and recipient application forms. For the first time Commission staff also talked to Federal civil rights officials in regional and district offices. Agency representatives were interviewed in Boston, Dallas, New Orleans, San Francisco, Los Angeles, and Chicago.

In addition, this is the first of our studies on Federal enforcement activities to cover the Government's efforts to end discrimination based on sex. The Commission's jurisdiction was expanded to include sex discrimination in October 1972. Information on sex discrimination is an integral part of each section of this study.

To assure the accuracy of this report, before final action, the Commission forwarded copies of it in draft form to departments and agencies whose activities are discussed in detail, to obtain their comments and suggestions. Thus far their responses have been helpful, serving to correct factual inaccuracies, clarify points which may not have been sufficiently clear, and provide updated information on activities undertaken subsequent to Commission staff investigations. These comments have been incorporated in the report. In cases where agencies expressed disagreement with Commission interpretations of fact or with the views of the Commission on the desirability of particular enforcement or compliance activities, their point of view, as well as that of the Commission, has been noted. In their comments, agencies sometimes provided new information not made available to Commission staff during the course of its interviews and investigations. Sometimes the information was inconsistent with the information provided earlier. Although it was not always possible to evaluate this new information fully or to reconcile it with what was provided earlier, in the interest of assuring that agency compliance and enforcement activities are reported as comprehensively as possible, the new material has been noted in the report.

In the course of preparing this report, Commission staff interviewed numerous Federal workers in the field of equal employment opportunity and made a large number of demands upon Federal agencies for data and documents. The assistance received was generally excellent. Without it, we would not have been able to publish our views at this time. We further would like to note our belief that many of the Federal employees assigned to duties and responsibilities within the equal employment opportunity area should be commended for what they have done, considering the legal and policy limitations within which they have been working.

This report does not deal primarily with the substantive impact of civil rights laws. The Commission will not attempt here to measure precise gains made by minority group members and women as a result of civil rights actions of the Federal Government. This will be the subject of other Commission studies. Rather, we will attempt to determine how well the Federal Government has done its civil rights enforcement job--to evaluate for the period of time between July 1972 and December 1974 the activities of a number of Federal agencies with important civil rights responsibilities.

The purpose of this series of reports is to offer, after a careful analysis, recommendations for the improvement of those programs which require change. The Commission's efforts in this regard will not end with these reports. We will continue to issue periodic evaluations of Federal enforcement activities designed to end discrimination until such efforts are totally satisfactory.

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The report was prepared under the overall supervision of Jeffrey M. Miller, Assistant Staff Director for Federal Civil Rights Evaluation. The following staff members provided support in the preparation of this report: Randall D. Briggs, Joyce M. Butler, Alice R. Burruss, Patricia A. Cheatham, Wallace Greene, Jeanette M. Johnson, Edwina R. Miles, Grenda L. Morris, Micheline M. Perry, Penny K. Smith, Patsy Washington, Mary Watson, Brenda Watts, and Rita L. Young.

Chapter 1

CIVIL SERVICE COMMISSION (CSC)

I. Introduction

The Federal Government, with nearly three million civilian employees, or almost four percent of the total work force, is the Nation's largest employer.[1] Each year, the Federal personnel system processes over 200,000 new appointments and over two million other types of personnel actions.[2] Today, responsibility for coordinating this large-scale system is vested with the U.S. Civil Service Commission, an agency established in 1883 to replace the practice of political patronage with a merit system of government service.

For the first 90 years of its existence, the Federal Government bureaucracy was staffed largely by persons appointed by virtue of their political affiliation. A reform movement critical of this "spoils system" grew strong during the decade of the 1870's but was unsuccessful until after the assassination of President James A. Garfield by a disappointed officer-seeker in 1881.[3] Two years later, the basic legislation establishing the Civil Service Commission and the merit system was enacted in the 1883 Pendleton Act, which, although modified over the years, still remains largely intact.[4]

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[1] Total Federal civilian employment as of September 1974 was 2.869 million. CSC, Bureau of Manpower Information Systems, Federal Civilian Manpower Statistics, November 1974. Total civilian employment in the United States in September 1974 was 86.242 million. Bureau of Labor Statistics, Department of Labor, Employment and Earnings (December 1974).

[2] CSC, Bulletin No. 250-5, Assuring the Integrity of the Merit System, Nov. 7, 1974.

[3] See P.P. Van Riper, History of the United States Civil Service (1958).

The Pendleton Act, also known as the Civil Service Act, established a three-person Commission, the members to be appointed by the President with the advice and consent of the Senate but subject to removal at any time by the President. Bipartisanship was sought by stipulating that no more than two Commissioners could be from the same political party.[5]

Although the merit system originally applied to only slightly more than 10 percent of all Government positions, the system was gradually expanded by Presidential order to cover almost 80 percent of the Federal service by 1930.[6] During the first administration of President Franklin D. Roosevelt, however, Congress exempted almost 60 of the New Deal agencies from Civil Service regulations because, it was alleged by the sponsors of the legislation, the Commission was not equipped to respond efficiently to the needs of the expanding Government.[7] As a result, the percentage of Federal positions covered by the Commission's authority decreased to approximately 60 percent.[8] This trend was reversed in 1940, with the passage of the Ramspeck Act,[9] which authorized the President to place these agencies under the Commission's jurisdiction; by 1943, approximately 95 percent of Federal service positions were within the merit system.[10]

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[4] The Act is now incorporated in 5 U.S.C. § 1101 et seq. The Act as passed in 1883 is reproduced in D. R. Harvey, The Civil Service Commission 218-23 (1970).

[5] The Civil Service Act, as reprinted in Harvey, supra note 4, at 218-19. These provisions have been incorporated in 5 U.S.C. § § 1101-1102. The term of office of each Commissioner is six years, with a term expiring every odd-numbered year. 5 U.S.C. § 1102(a). President Woodrow Wilson is the only President to have used the removal authority extensively; in 1919, he removed all three Commissioners. Van Riper, supra note 3, at 239.

[6] Id. at 105 and 312.

In the intervening years, the Federal service had been substantially transformed by the influx of New Deal personnel and by a series of events leading to the development of a centralized personnel system. In 1938, President Roosevelt ordered the Commission to develop and supervise a uniform system for recruitment, examination, promotion, and transfer in the Federal service covered by the merit system. During World War II, the Commission assumed the responsibility for directing all of the civilian personnel activities of the Federal Government. At the same time, the War Service Regulations permitted the relaxation of requirements in order to fill positions for the period of the war without granting permanent status.[11] The exigencies of the war led the Commission to delegate certain functions to the agencies, such as promotion actions and position classifications,[12] with the understanding that actions would be taken pursuant to Commission guidelines and would be subject to post audit by the Commission. The delegation of these functions became permanent following the war, largely due to a policy decision by President Truman which proved to be consistent with the recommendations of the Hoover Commission Report of 1949. This report recommended that the Commission not conduct routine personnel operations, but rather provide leadership for Federal personnel administration by setting standards, conducting audits, and applying sanctions where substandard practices were found.[13] The Hoover Report furnished the fundamental framework within which the Commission operates today.[14] At the same time, however, the Report's major recommendation for statutory reform concerning personnel selection was ignored.[15]

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[7] The Commission recently indicated that "(w)hile the reason cited may well have been a factor in the decision to exempt the agencies referred to, it is likely that other considerations also affected the decision, and that the primary considerations were political ones." Letter from Robert E. Hampton, Chairman, CSC, to John A. Buggs, Staff Director, Commission on Civil Rights, May 2, 1975.

[8] Van Ripper, supra note 3, at 315-29. Harvey, supra note 4, at 11-13.

[9] 5 U.S.C. §§ 2102, 3304 (1940).

[10] Van Riper, supra note 3, at 344.

[11] Id. at 369-401; Harvey, supra note 4, at 13-21.

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[12] All Federal jobs within the merit system are classified according to series. This classification system is briefly discussed in note 43 infra.

[13] Van Riper, supra note 3, at 456-75; Harvey, supra note 4, at 21-23. The Hoover Commission Report also recommended that the position of the President of the Commission be replaced by a chairman with expanded authority to direct the agency's basic operations. This recommendation was adopted immediately through a reorganization plan implemented by President Harry S. Truman in 1949. Van Riper, supra note 3, at 460.

[14] The Commission's current organization and functions are discussed on pp. 19-23 infra.

[15] The Hoover Commission report recommended modification of the "rule of three," which had been enacted in the Veterans' Preference Act of 1944. Van Riper, supra note 3, at 463. The "rule of three" is discussed on p. 31 infra.

The basic merit system legislation passed in 1883 authorized the President, with the aid of the Commission,[16] to issue rules governing the filling of positions by open competitive examinations "...practical in their character...." which would "...fairly test the relative capacity and fitness...." of applicants to perform the duties of the positions sought.[17] The Act further stated that positions covered by the system "...shall be filled by selections according to grade from among those graded highest...."[18] The framers of the Civil Service Act expressly rejected the British civil service tradition of restricting admission into the service to the lowest job level and of selecting candidates on the basis of theoretical, essay tests. By stressing that the competitive exams be "practical in character" and that the service be open at all levels, the framers of the Act attempted to ensure that selection for the Nation's civil service would be made on the basis of a person's ability, irrespective of other considerations, to perform the duties of specific jobs.[19]

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[16] The Commission's authority derives from the authority granted the President by the Act. This provision, as well as the provision giving the President removal authority, distinguishes the Commission from independent commissions. Van Riper, supra note 3, at 110. However, the legislative history of the Civil Service Act appears to indicate that Congress did not intend the Commission to be a purely executive agency. Id. at 399.

[17] The Civil Service Act, Sec. 2, as reprinted in Harvey, supra note 4, at 219. The provision is incorporated in 5 U.S.C. § 3304(1) which requires that competitive examinations be "...practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought...."

[18] The Civil Service Act, Sec. 2, as reprinted in Harvey, supra note 4, at 219. This provision has been revised to require that the selection be made from the highest three eligibles available for appointment. 5 U.S.C. § 3318. This "rule of three" is discussed on p. 31 infra.

If in 1883 the Federal Government had implemented this concept, the Nation would have discovered during the 20th Century the values inherent in building a government whose personnel is reflective of the population as a whole, in terms of race, ethnicity, sex, economic background, and other factors.[20] The Nation would have discovered that a civil service, operating in a manner consistent with the equal opportunity guarantees embedded in the Constitution, would more likely have the broad range of experience and skills necessary to address society's problems. Moreover, it would more likely generate support for government programs by all groups in society. Because of the growing tendency of elected representatives to delegate and assign legislative and judicial functions to the Federal bureaucracy, it has become increasingly crucial that the practices which for many years denied equal employment opportunities to

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19. Van Riper, supra note 3, at 100-01. See also J.W. Macy, Jr., Public Service: The Human Side of Government 67 (1971).

20. See J. Donald Kingsley, Representative Bureaucracy (1944); S. Krislov, The Negro in Federal Employment: The Quest for Equal Opportunity 46-64 (1967); H. Kranz, Are Merit and Equity Compatible? 35 Pub. Admin. Rev. 434 (September/October 1974); J. Couturier, Executive Director, National Civil Service League, Civil Rights in Civil Service--The Winds of Change, 34 Pub. Admin. Rev. 244 (May/June 1974).

The Commission maintains that "a more reasonable interpretation" of representative bureaucracy would be "one drawn from all elements of the population on the basis of ability--but not in any numerical proportion so as to produce an exact copy of the total society. Such a definition is completely compatible with the Civil Service Act of 1883 and the merit employment system which derives from that legislation, as well as with law and Executive order on equal employment opportunity." Hampton letter, supra note 7. Nevertheless, the Commission disagrees that the framers of the Civil Service intended to provide for a representative bureaucracy and believes that the introduction to this report "reflects an effort to rewrite history." Id.

citizens because of their race, color, national origin, religion, or sex, and by doing so deprived the Nation of the benefit of their services, be eliminated from public employment procedures.[21]

The harsh reality has been that certain minority groups and women have not had the door of the Federal Civil Service system open to them. Indeed, although a merit system would ostensibly preclude treatment on the basis of race, ethnicity, or sex, nevertheless, overt discrimination against minorities persisted for more than 50 years after the Civil Service Act and against women until the last decade.

Prior to the passage of the Civil Service Act, the Federal service was less than one percent black. Until 1865, blacks had been prohibited by statute from working in the Postal Service and were excluded from most other services by custom. To compensate for ending Reconstruction in 1877, President Rutherford B. Hayes, became the first President to appoint blacks to any significant positions.[22] At first, the introduction of the merit system had a positive influence on the employment of blacks. From 1821 to 1910, black employment increased to almost six percent of the total Federal service. However, during the administration of President William Howard Taft, racial segregation was established in the Census Bureau, a practice which was subsequently followed under President Woodrow Wilson in the Department of the Treasury and the Postal Service--with

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21. S. Krislov, Representative Bureaucracy (1974); V. Subramaniam, Representative Bureaucracy: A Reassessment, 61 Am. Pol. Sci. Rev. 1010 (1967). See also, Speech by Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, before the Regional Civil Rights Conference, Boston, Massachusetts, Sept. 22, 1974; and Advisory Council on Intergovernmental Personnel Policies, More Effective Public Service, Supplementary Report to the President and the Congress (October 1974).

22. Krislov, supra note 20, at 7-17.

the express approval of the President.[23] During World War I, overt discrimination was tolerated in the military; for example, black clerks were required by the Navy to work behind screens.[24] In 1914, the Civil Service Commission began requiring that photographs be attached to applications, and by 1918, black employment had fallen to less than five percent of total Federal employment.[25] The practice also created greater opportunities for overt discrimination against Spanish surnamed Americans.[26] Throughout the next 30 years, black employment grew primarily during periods of labor shortages; by 1944, blacks represented almost 12 percent of Federal employees, although they were primarily concentrated in custodial and other low-paying jobs.[27] Moreover, segregation of facilities continued well into the administration of President Franklin D. Roosevelt.[28]

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23. Van Riper, supra note 3, at 161-62 and 241-42. President Wilson wrote to the editor of a periodical in 1913, "I would say that I do approve of the segregation that is being attempted in several of the departments." Id. at 242, n. 52.

24. Krislov, supra note 20, at 21.

25. This practice of requiring photographs was discontinued by the Commission in 1939.

26. Telephone interview with Carlos Esparza, Director, Spanish Speaking Program, CSC, Jan. 27, 1975.

27. Id. at 22; Van Riper, supra note 3, at 378.

28. Krislov, supra note 20, at 22-27.

Women were similarly subjected to discriminatory treatment. In the late 19th century, women were employed almost exclusively as clerks at salaries statutorily set at half the amount paid to men. By 1904, women made up 7.5 percent of the Federal civil service, but it was not until 1912 that a woman was appointed to as high a position as bureau chief. During World War I, more job opportunities became available to women; as a result, 20 percent of Federal employees were women by 1919. Until that year, however, 60 percent of Civil Service examinations had been closed to women, and not until 1923 were women given the right to equal pay for equal work. World War II, with its concomitant labor shortages, resulted in an increase in the employment of women to 40 percent of Federal employees by 1944; by 1947, however, the figure had dropped to less than 26 percent. Overt discrimination against women was permitted under the merit system until well into the 1960's, by virtue of a rule which permitted appointing officers to refuse to consider female candidates certified as qualified by the Commission.[29]

Although the Federal Government has long been prohibited by the Constitution from practicing discrimination,[30] it was not until almost 60 years after the passage of the Civil Service Act that racial or ethnic discrimination was expressly prohibited in Federal employment. The Ramspeck Act of 1940 provided the first statutory ban on discrimination.[31] Only 19 days before its passage, President Franklin D. Roosevelt issued the first of a series of Executive orders prohibiting racial, ethnic, or religious discrimination in Federal employment.[32]

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[29] Van Riper, *supra* note 3, at 159-61, 260-61, and 377. See also, Macy, *supra* note 19, at 84. The rule permitted hiring officers to request candidates according to sex based on a legal interpretation of existing law; thus, it also permitted discrimination against men. The rule was revoked after the Attorney General interpreted it to be improper.

[30] Bolling v. Sharpe, 347 U.S. 497 (1954).

In 1941, a Presidential Committee on Fair Employment Practices was established with the authority to investigate discrimination complaints. The Committee relied heavily on the Commission to conduct investigations; however, the Commission refused to look into matters it believed were within the discretion of the agency, and it refused to make a finding of discrimination unless there had been a violation of its own rules.[33] The Committee was abolished in 1946 because of congressional opposition, and it was not until 1961 that another independent authority to enforce equal employment in the Federal service was established.[34]

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[31] 5 U.S.C. §§ 2102, 3304 (1940). Title II of the Ramspeck Act authorized the President to modify pay standards, provided there was no discrimination on the basis of race, color, or creed. Van Riper, supra note 3, at 345.

[32] Exec. Order No. 8587 3 C.F.R. 824 (1940); Krislov, supra note 20, at 32.

[33] Krislov, supra note 20, at 33-34. From 1941 to 1943, the Commission was assigned the responsibility for investigating all complaints. In 1943, the Committee began to conduct independent investigations, and by 1945, it had investigated more than 2,000 complaints. From 1941 to 1946, the Commission investigated 1,871 complaints and found discrimination in only 58 cases. Id.

[34] A Presidential Committee on Government Employment Policy, established by President Dwight Eisenhower in 1955, was purely advisory in nature. Krislov, supra note 20, at 35.

In 1961, President John F. Kennedy issued Executive Order 10925, which established the President's Committee on Equal Employment Opportunity and announced a new program emphasis on affirmative action, rather than mere nondiscrimination.[35] In 1964, Congress failed to include the Federal Government in the coverage of Title VII of the new Civil Rights Act,[36] but it did provide in the statute[37] that the policy of the United States was to ensure nondiscrimination on the basis of race, color, religion, sex, or national origin in Federal employment. This obligation, based on the fifth amendment to the Constitution, had been judicially recognized at least ten years earlier.[38] The 1964 Civil Rights Act included the first policy statement opposing discrimination in Federal employment on the basis of sex.

In 1965, President Johnson transferred Federal equal employment enforcement responsibility from the President's Committee to CSC,[39] and in 1967 issued the first Executive order banning sex discrimination.[40]

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[35] Exec. Order No. 10925, 3 C.F.R. 448 (1961). Krislov, supra note 20, at 36-40.

[36] The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. (1970).

[37] 42 U.S.C. § 2000e(b) (1970). An identical provision was subsequently enacted in 1966, 5 U.S.C. § 7151.

[38] Bolling v. Sharpe, supra note 30.

[39] Exec. Order No. 11246, 3 C.F.R. 339 (1965). See also Macy, supra note 19, at 75.

[40] Exec. Order No. 11375, 3 C.F.R. 133, 42 U.S.C. § 2000e (1970).

In 1969, President Nixon issued Executive Order 11478, which emphasized that each Federal agency was responsible for developing an affirmative action program.[41]

In 1971, congressional committees found that the Federal Government had still not achieved representativeness in its bureaucracy, despite the recognition for more than 40 years of the need for safeguards to protect racial and ethnic minorities against discrimination.[42] Although lower-level government positions had been opened to women and minorities, these groups were still largely excluded from the policy-making and higher positions in the Federal service. In 1970, minorities made up 19.4 percent of all Federal employees, but 27 percent of those in Grades 1-4 and only 2 percent of those in levels above Grade 15.[43] Spanish surnamed Americans, who constituted at least 4.5 percent of the Nation's population,[44] represented only 2.9 percent of Federal employees, and only .3 percent of those above Grade 15.[45] Women constituted 33 percent of Federal employees in 1969, but 75 percent of those in the lowest four grades and only 2 percent of employees in levels above Grade 15.[46]

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[41] Exec. Order No. 11478, 3 C.F.R. 133 (1969).

[42] Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 (H.R. 1746, P.L. 92-261) Amending Title VII of the Civil Rights Act of 1964 82-88 and 421-25 (Comm. Print 1972) [hereinafter cited as Legislative History].

[43] Id. at 422. The Federal service is divided into several pay classification systems. The General Schedule (GS) system, which covers most white collar jobs, accounts for almost half of the total Federal employment. CSC 90th Annual Report, Fiscal Year Ended June 30, 1973, 62 (January 1974) [hereinafter cited as 1973 Annual Report]. The GS system is divided into 18 pay levels, or grades, defined by statute according to degree of responsibility and skill. 5 U.S.C. § 5104. As of January 1975, the lowest four grades ranged in starting salary from $5,294 (GS-1) to $7,596 (GS-4). The annual starting salaries for higher grades ranged from $29,818 (GS-15) to $49,336 (GS-18), although in practice no pay rate exceeded $36,000 because Federal law limits the salaries of Federal employees to the rate set for the lowest positions filled by Presidential appointment (Level V of the Executive Schedule), which was $36,000. 5 U.S.C. § 5308. Federal blue collar jobs are covered by the Federal Wage System and the Postal Field Service, which account for approximately 20 and 25 percent, respectively, of all Federal employment. There are a number of small pay systems, for example, that covering the Foreign Service, which combined account for 7 percent of Federal employment. 1973 Annual Report, supra note 43, at 62.

The Congressional committees cited two fundamental reasons for the government's lack of progress in achieving an equitable representation of all groups. First, the Commission's enforcement of Executive Order 11478 had been defective with regard to the processing of employment discrimination complaints; because the Commission permitted agencies to investigate and judge themselves, there had developed a widespread lack of confidence in the complaint process.[47] Second, the Committees found that there was evidence that the Commission's selection standards and procedures had created systemic discrimination against women and minorities which would have been unlawful under Title VII.[48]

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[44] Bureau of the Census, U.S. Department of Commerce, PC(2)-IC, 1970 Census of Population Subject Report--Persons of Spanish Origin, IX (June 1973). See also U.S. Commission on Civil Rights, Counting the Forgotten (April 1974).

[45] Legislative History, supra note 42, at 422. In 1974, the Supreme Court noted that the deficiencies in the Commission's complaint system were one of the major reasons Congress extended Title VII to Federal employment. Morton v. Mancari, 42 U.S.L.W. 4933, 4937 (1974).

[46] Legislative History, supra note 42, at 1,757.

[47] Id. at 83-84 and 423-24. The Commission's complaint procedures are discussed more fully in Part IV infra.

[48] Id. at 83-84 and 423-24.

As a result, Congress enacted the 1972 Amendments to Title VII, which extended the basic protections to Federal employees that had been afforded employees of private employers since 1964.[49] The Act banned discrimination on the basis of race, color, religion, sex, or national origin in any personnel actions affecting employees or applicants in military departments, executive agencies, the Postal Service, and in all positions within the competitive service of the Federal Government.[50] CSC was directed to review and approve agency affirmative action plans on an annual basis and routinely to evaluate agency equal employment opportunity programs.[51] In addition, the Commission was specifically instructed to review the merit system's selection standards in relation to civil rights.[52] Finally, Federal employees were given the same right as private employees to sue in Federal district court for adjudication of their discrimination claims.[53]

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[49] 42 U.S.C. § 2000e-16. Although Congress intended that Federal employees have the same right as private employees, Federal employees still face a number of serious barriers not imposed on private employees, and they still lack certain basic rights clearly established for private employees under Title VII as interpreted by the courts. For a discussion of these problems, see Part IV infra.

[50] 42 U.S.C. § 2000e-16(a).

[51] 42 U.S.C. § 2000e-16(b). For a discussion of the Commission's guidelines and reviews of agency affirmative action plans, see Part V infra. The Commission's evaluations of agency equal employment programs are discussed in Part VI infra.

[52] Conference Report accompanying H.R. 1746, Legislative History, supra note 42, at 1,818.

[53] 42 U.S.C. § 2000e-16(c) states that after 180 days of the filing of the complaint or within 30 days of final agency action on the complaint, Federal employees may bring a civil action according to the same procedures provided private employees to sue under Section 2000e-5 of the statute. As of February 1975, the courts were divided on the question of whether a Federal employee had the right to a trial de novo in a civil action filed following a final agency decision. For a brief discussion of the issue, see note 294 infra.

By May 1974[54] minorities had increased from 14.7 percent in 1970 to 17 percent of all General Schedule employees, and from 19.6 percent of total Federal employment under all pay plans in 1970 to 21.0 percent in 1974, but they were still heavily concentrated in the lowest four grade levels.[55] Spanish surnamed American employment increased from 1.9 percent to 2.4 percent of all General Schedule positions. Some progress had been made in improving the proportion of minorities at the higher grades. As of May 1974, minorities represented 3.9 percent of those in levels above Grade 15.[56] Women increased from 33 percent of all employees in 1970 to 34 percent in 1973,[57] a level still below that at which women were represented in the work force as a whole.[58] Moreover, the severe concentration of women in the lowest four grades remained the same. In both 1970 and 1973 women constituted 75 percent of the employees in those grades. From 1970 to 1973 women employed above the Grade 15 level increased from 2 percent to 2.3 percent,[59] which constituted a rate of change so slow that, if continued, would result in only 5 percent of these jobs being held by women at the beginning of the 21st century.[60]

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[54] As of June 1975, data on female employment during 1974 were not available.

[55] U.S. Civil Service Commission News Release, June 12, 1975. Minorities in the four lowest grades increased from 27 to 28.5 percent.

[56] Id. The Commission indicated, however, that in 1973 minorities held a greater percentage of the jobs at every grade level but one above Grade 4 than in 1970. It also noted that 27,370 more minorities held jobs at grade levels above GS-4 in 1973 than in 1974. Hampton letter, supra note 7.

[57] CSC, Manpower Statistics Division, Bureau of Manpower Information Systems, Federal Civilian Employment. Women, 1973 Study (1973).

[58] In 1973, women constituted 38.9 percent of the national work force. Department of Labor, Bureau of Labor Statistics, Employment and Earnings, January 1974.

[59] Federal Civilian Employment: Women, 1973 Study, supra note 57.

The records of certain agencies were particularly poor. For example, the work force of the National Aeronautics and Space Administration (NASA) was only 5.3 percent minority and 18.2 percent female.[61] At the Department of Transportation (DOT), minorities represented only 8.9 percent and women only 16.7 percent of the total employees. Similarly, at the Department of Agriculture (DOA) minorities were only 9 percent and women only 22 percent of the agency work force. There was no minorities above the GS-15 level at the Government Printing Office (GPO) nor at the Farm Credit Administration (FCA), and there were no women above that level at more than 17 major agencies, including the Government Accounting Office (GAO), the U.S. Department of the Interior (DOI), the Federal Deposit Insurance Corporation (FDIC), and the General Services Administration (GSA).[62]

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[60] The Commission maintains that there has been substantial progress in increasing the numbers of minorities and women in the Federal service and that "evidence which actually shows a consistent and dramatic pattern of progress in equal employment opportunity...has not only been given minimal attention in the CRC...report, but has been so misquoted and distorted where it is referenced that it leads the report to conclude incorrectly that there has been little or no progress." Hampton letter, *supra* note 7.

[61] U.S. Civil Service Commission, Minority Group Employment in the Federal Government (May 1973) and Federal Civilian Employment: Women 1973 Study, *supra* note 57.

[62] *Id.* Other agencies at which women were not employed above the GS-15 level included GPO, FCA, Cost of Living Council, National Security Council, Office of Economic Opportunity, Departments of the Army and Air Force, Federal Home Loan Bank Board, Federal Power Commission, Federal Trade Commission, Selective Service, Small Business Administration, and the Smithsonian Institution. *Id.* The Commission has indicated that all cabinet agencies, with the exception of the Department of the Interior, have women in positions above the GS-15 level. Hampton letter, *supra* note 7.

Thus, it is clear that minorities and women have not been fully integrated into the Federal civil service.

In its comments on this report, the Civil Service Commission criticized this Commission's endorsement of the goal of achieving a Federal bureaucracy reflective and representative of all race, ethnic, and sex groups, indicating that such a position was in effect:

> a quota system--an approach to personnel management which is not compatible with the basic philosophy of merit system employment or with legal requirements of the Civil Service Act that appointments be made on the basis of merit, and of Title VII that personnel actions be free from discrimination based on race, color, religion, sex, or national origin. Moreover, quota systems have always been abhorred by those who truly have supported concepts of equality and civil rights and liberties. 63

The Commission on Civil Rights strongly opposes quota systems by which an employer limits its work force to fixed numbers or percentages of any race, sex, or ethnic group. We recognize that such quota systems have been used to keep members of certain minority groups and women from achieving their full potential and believe that there is no legal or moral justification for such practices.

There is, however, a fundamental disagreement between the Civil Service Commission and the Commission on Civil Rights on the question of what affirmative duty rests with the Federal Government for eliminating the vestiges of discrimination and assuring that nondiscriminatory practices are followed in the future. It is the position of the Commission on Civil Rights that the equal employment and affirmative action guidelines, applicable to private employers and State and local government employers under Title VII of the 1964 Civil Rights Act and under Executive Order 11246, must be followed by the Federal Government as minimum standards for complying with the mandate of the

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63. Hampton letter, supra note 7.

Congress that employment discrimination in the civil service be eliminated.

As the Commission on Civil Rights noted in 1973 in its Statement on Affirmative Action for Equal Employment Opportunities[64] serious underutilization of minorities or women has long been held under Title VII to constitute a prima facie violation of the Act, requiring the imposition of broad relief by the court if the employer fails to come forward with sufficient justification; similarly, under the Executive order, unjustified underutilization requires the establishment of goals and timetables for eliminating underutilization. By underutilization, the Commission means the disparity between minority and female employment in the employer's work force and the proportion of these groups having those skills and knowledges manifestly related to the job. The establishment of goals and timetables, we insist, is not a quota to fix a particular level of employment for any group, but rather an attempt to make a good faith effort to overcome past discriminatory practices which excluded minority and female applicants.

Not only does the Federal Government suffer from unmistakable underutilization of minorities and women in its middle and higher ranks, but it also has a record of overt discrimination against these groups in the past, which has resulted historically in preference being given to nonminority males.

Accordingly, it is the position of the Commission on Civil Rights that the Federal Government has an affirmative responsibility to identify all personnel practices which have a discriminatory effect. As will be discussed in Section III, below, the Civil Service Commission's selection practices have been subjected to serious challenges on the grounds that they have such a discriminatory effect and have not been shown to be objective measures of merit, that is, the ability to do the job. Under the weight of Title VII law, discriminatory selection practices which are not empirically predictive of merit in job performance have often, in and of themselves, formed the basis for court-imposed goals and timetables for eliminating the effects of discrimination. In any event, the establishment of goals and timetables for employing minorities and women has long been viewed by the Federal Government in its role as enforcer of the law as the most effective tool for ensuring that systemic practices resulting in preferences for nonminority males have been eliminated. The Federal Government, in its role as an employer, should no longer be permitted to evade the affirmative action responsibilities placed on the shoulders of all other employers.

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[64] U.S. Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities, Clearinghouse Publication No. 41, 7-9, 12, 19-23 (1974).

This Commission's criticism of the current practices of the Civil Service Commission and CSC's defense of its activities should be read in the light of the fundamental differencies identified above.

II. Organization and Staffing

The Commission consists of three Commissioners appointed by the President for six-year terms, with a term expiring every two years. One of the three Commissioners is designated by the President as Chairman and one as Vice-Chairman.[65] The Commission's staff totals more than 6,500 employees.[66] There are seven staff offices which report directly to the Commissioners, including the Office of the General Counsel, the Federal Employee Appeals Authority (FEAA), and the Appeals Review Board (ARB).[67] The FEAA, which has a staff of 131 persons,[68] is responsible for processing and hearing all employee appeals from agency decisions concerning adverse actions, terminations, or reductions in force. The ARB, with a staff of 43 employees, reconsiders FEAA decisions in a limited number of cases and has original jurisdiction to hear all appeals from agency decisions in employment discrimination cases.[69]

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[65] 5 U.S.C. §§ 1101-1103.

[66] CSC, Bureau of Manpower Information Systems, Central Personnel Data File Report, May 31, 1974.

[67] The other four offices which report directly to the Commissioners are the following: Federal Executive Institute, Federal Prevailing Rate Advisory Committee, International Organizations Employees Loyalty Board, and the Administrative Law Judges. CSC, Bureau of Management Services, CSC organization, 1974.

The Executive Director of the Commission, who is a career employee selected by the Chairman, is responsible for supervising the operations of six staff offices, 10 bureaus, 10 regional offices, and approximately 65 area offices of the Commission. Responsibility for overseeing the regional offices has been delegated to the Deputy Executive Director. The six staff offices which are part of the Office of the Executive Director include the Offices of Public Affairs, Labor-Management Relations,[70] Incentive Systems,[71] and Federal Equal Employment Opportunity (FEEO).[72]

The FEEO is the only one of these offices which does not report directly to the Executive Director. Instead, the Director of FEEO reports to the Assistant Executive Director.[73] In fact, it is the Assistant Executive Director who is in charge of the Federal equal opportunity program. The Assistant Executive Director spends approximately 90 percent of this time on equal employment opportunity program activities, including monitoring other bureaus and offices.

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[68] Interview with Anthony Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Nov. 5, 1974.

[69] The ARB is discussed more fully in Part IV infra.

[70] This office is responsible for providing technical information and policy guidance to Federal agencies concerning employee unions, CSC organization, supra note 66.

[71] This office is in charge of assisting Federal agencies to develop systems for rewarding employees for outstanding performance and cost-saving suggestions. Id.

[72] The other offices which report to the Executive Director are the Office of Administrative Law Judges, which is responsible for supervising the hiring and payment of administrative law judges in regulatory agencies, and the Office of the Interagency Advisory Group, which is made up of the personnel directors from each Federal agency. Id.

With a staff of 34 in headquarters and 45 in the Commission's regional offices,[74] the FEEO is responsible for reviewing affirmative action plans and overseeing the complaint system, as well as programs on upward mobility, women, and Spanish-speaking Americans.[75]

The major program responsibilities of the Commission rest with ten bureaus in headquarters and their counterparts in the regional offices. The bureaus develop program policy guidelines, which are implemented by the regional offices under the supervision of the Deputy Executive Director.

Government-wide personnel policy is developed and coordinated by the Bureau of Policies and Standards (BPS), which in 1974 had a staff of 233.[76] This Bureau sets the classification standards which govern the content and grade level of most Government jobs, as well as the qualification standards which are prerequisites for employment in these jobs. As a part of this responsibility, BPS develops selection, or testing, devices for rating job applicants. In addition, the Bureau manages the pay systems for all General Schedule (GS) and many blue collar jobs.[77]

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[73] The Assistant Executive Director also represents the Commission in staff-level meetings at the Equal Employment Opportunity Coordinating Council (EEOCC). The EEOCC is discussed in Chapter VII *infra*. The Commission believes that the assignment of managing the EEO program to the Assistant Executive Director has "ensured that top level management attention is always immediately available and given to EEO program leadership." Hampton letter, *supra* note 7.

[74] Hudson interview, *supra* note 67.

[75] The Federal employment discrimination complaint system is discussed in Part IV *infra*. The procedures governing affirmative action programs, as well as those on upward mobility, women, and Spanish speaking Americans, are discussed in Part V *infra*.

[76] CSC organization, *supra* note 66; Central Personnel Data File Report, *supra* note 65.

The selection techniques designed by the Bureau of Policy and Standards are applied by the Bureau of Recruiting and Examining (BRE) in carrying out its responsibility for testing applicants for entry or transfer into government jobs in more than a thousand different fields. With a staff of approximately 130 persons in 1974, BRE also assists agencies in developing and implementing their merit promotion programs.[78]

The Bureau of Personnel Management Evaluation (BPME) is responsible for evaluating agencies' personnel programs and practices to determine whether they conform to all Commission regulations. With a combined total staff of 245 in 1974, the Bureau and the division counterparts in the regional offices conduct general personnel management reviews, as well as special reviews covering specific areas such as equal employment opportunity.[79] In addition to its review responsibilities, the Bureau is in charge of receiving all appeals to the Commission from third party or general allegation complaints.[80]

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77. In addition to the GS system, BPS manages the Federal Wage System. These pay systems are briefly described in note 43 supra.

78. CSC organization, supra note 66; Control Personnel Data File Report, supra note 65.

79. Id. These reviews are discussed in Part IV infra.

80. These types of complaints are discussed on pp. 63-4 infra.

The Bureau of Training, which had a staff of 238 in 1974, is in charge of developing job-related training programs sponsored by the Commission and other agencies for Federal employees. Among its responsibilities is the supervision of the Southwest Intergovernmental Training Center, which was established in 1970 to improve the opportunities of Spanish speaking Americans for Federal employment.[81]

The only other Bureau having program responsibilities directly related to equal employment opportunity is the Bureau of Intergovernmental Personnel Programs (BIPP).[82] Established in 1971 to administer the Intergovernmental Personnel Act,[83] BIPP manages a grant program for improving personnel practices in State and local governments and sets certain merit standards to be followed by State and local governments receiving Federal assistance through approximately 30 different grant programs.[84]

The remaining bureaus are those of Executive Manpower, which coordinates and oversees Federal agencies' staffing of positions at Grades 16-18; Personnel Investigations, which clears most employees before entering the Federal service; Retirement, Insurance, and Occupational Health; Management Services, which is responsible for providing budget, finance, and personnel functions for the Commission; and Manpower Information Systems, which maintains the Commission's data processing system.

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[81] CSC organization, supra note 66; Central Personnel Data File Report supra note 65.

[82] As noted above, several of the Commission bureaus carry out functions related to equal employment. The Commission indicated, however, that this report does not "portray the significant extent to which the resources and expertise of many of the CSC's organizational components contribute to the overall equal employment opportunity program leadership effort." Hampton letter, supra note 7.

[83] 42 U.S.C. §§ 4701-4772.

[84] The program responsibilities of BIPP are discussed in Chapter II infra.

III. Recruiting and Examining

The Federal personnel system operates within an intricate statutory and regulatory framework, which governs all phases of the employment process, including recruitment, hiring, placement, transfers, and promotions, as well as terms and conditions of employment.[85] The Commission is responsible for setting standards and overseeing the conduct of these operations by the Federal departments and agencies as well as for carrying out certain recruitment and examining functions itself.

Every stage of the employment process can have an impact on the employment opportunities of women and minorities. The legislative history of the 1972 amendments to Title VII indicates that Congress recognized the need for a thorough analysis of the total operations of the Federal personnel system in the light of Title VII to determine what practices were in conflict with the law's objectives.[86] While the Commission has begun to take a few steps toward such an analysis, it has not conducted any systematic review[87] to determine which practices have an adverse impact on women and minorities, nor has it moved to bring any of its own standards into conformity with the standards required of private and State and local government employers under Title VII.

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[85] Statutory provisions governing Federal personnel matters are found in 5 U.S.C. § 1101 et seq. The Civil Service Commission's implementing regulations are located in 5 C.F.R. § 1.1 et seq. The Commission regularly communicates its rules, regulations, and instructions in a looseleaf publication entitled The Federal Personnel Manual (FPM), which includes operations letters and memoranda. These communications are binding on Federal agencies under the Civil Service Commission's jurisdiction.

[86] Legislative History, supra note 42, at 83-89, 423-24, and 1,818.

[87] The Commission maintains that this statement is not true and that a systematic review was initiated pursuant to an "Action Plan for Implementation of Public Law 92-261, The Equal Employment Opportunity Act of 1972." Hampton letter, supra note 7. The review referred to is described on pp. 49-51 infra.

Recruitment

The Commission and the agencies share responsibility for on-going recruitment into the Federal service. The Commission is in charge of general recruitment, including informing the public about opportunities in the Federal service and the application process. Approximately 100 Federal Job Information Centers located throughout the country are responsible for disseminating Commission recruitment literature and visiting recruitment sources.[88] The Commission's Bureau of Recruiting and Examining (BRE) has conducted reviews of recruiting materials developed by area offices and headquarters to ensure that their visual and verbal contents do not discourage minorities and women from applying.[89] BRE has issued guidelines which require that recruiting brochures contain adequate visual representation of minorities and women associated with a wide variety of jobs. In addition, the guidelines call for the elimination of sexist and racist stereotypes, such as portraying all secretarial workers as

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88. Interview with Allan W. Howerton, Director, Office of Recruitment and College Relations, Bureau of Recruiting and Examining, CSC, Nov. 19, 1974.

89. CSC Operations Letters No. 332-165, Mar. 23, 1973; and No. 332-93, May 15, 1974. The survey covered materials issued over a period of approximately two years and found that the images of women and minorities portrayed in Federal recruitment materials were improving. Id.

nonminority females, and for the use of gender neutral pronouns in referring to applicants and employees.[90]

BRE has also issued instructions to the Commission's regional offices concerning college recruiting, which are intended to improve the Commission's ability to reach minority applicants. During fiscal year 1974, regional offices were to visit every four-year higher education institution. For fiscal year 1975, the Commission planned to reduce significantly its on-campus recruiting activities; regional offices were instructed to visit only one-third of four-year colleges but all campuses with 25 percent or more minority enrollment.[91] The Commission does not believe that similar emphasis needs to be placed on recruiting at predominantly female colleges, since women are generally well represented on civil service eligibility lists based on entrance examinations.[92]

The Commission has not determined whether its recruitment programs have caused any increase in the proportion of female or minority applicants because it has failed to collect applicant flow data by race, ethnicity, or sex.[93]

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[90] Id.

[91] CSC Operations Letter No. 330-85, Sept. 30, 1974.

[92] Howerton interview, supra note 88.

[93] Id. The Commission maintains that the effect of recruitment of minorities is reflected in overall employment data. Hampton letter, supra note 7.

Although the Commission has considered the collection of such data on a sampling basis, it has not done so on the grounds that information collected from applicant responses would not be reliable.[94]

A second deficiency in the Commission's recruitment program is the failure to include in recruiting materials adequate information concerning the equal employment opportunity program. Although an EEO statement is included in all announcements of job opportunities, neither application forms nor job information brochures contain instructions on how to file a discrimination complaint.[95] The Commission does not include such information because it believes it would tend to establish a negative image of the Government as an employer among potential applicants.[96] To the contrary, publication of information concerning the right to file a complaint might assure applicants that they have some recourse to challenge unlawful discrimination and should, therefore, promote an image of the Government as a fair employer.

The Commission also has the responsibility for setting standards for agencies to follow in recruiting practices. However, the Commission has not issued sufficient guidance on the recruiting methods which should be followed to increase the flow of female and minority applicants. The Office of Federal Equal Employment Opportunity (FEEO) has included some

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94. Letter from Allan W. Howerton, Director, Office of Recruitment and College Relations, BRE, CSC, to Whitney Adams, Equal Opportunity Specialist, U.S. Commission on Civil Rights, Dec. 20, 1974. The Commission could obtain aggregate data on the racial composition of applicants through the Social Security Administration. Telephone interview with James Leith, Office of Research and Statistics, Social Security Administration, Feb. 19, 1975.

95. Commission job information offices do, however, display posters indicating how persons may file complaints.

96. Howerton letter, supra note 94.

instructions on recruitment in its guidelines on affirmative action.[97] These are limited to instructing agencies to develop appropriate literature, to establish relationships with schools having significant female and minority enrollments, and to develop cooperative education programs for student employment, as well as to monitor recruitment efforts.[98] FEEO has not developed, however, guidelines, similar to those issued by the Commission's regional offices, requiring that departments and agencies assign a minimum level of resources to recruitment at minority schools or providing instructions on including adequate female and minority representation in recruitment literature.[99]

Examining and Selection

All positions in the competitive service[100] must be filled by selection from an open competitive examination or by promotion, transfer, or reinstatement of a qualified incumbent or former employee with career status.[101] If a position is filled from outside the Federal service the agency must select a candidate from a list of persons certified by the Commission as qualified.[102] The Commission certifies and ranks candidates according to their abilities to perform in specific position classifications[103] at specific grade levels.[104] The Commission is required by law to give additional points to veterans or their surviving spouses or mothers in certain cases.[105] Since far more males than females are veterans,[106] the preference afforded veterans has an extremely discriminatory effect on employment of women in the Federal service.[107]

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[97] FPM Letter No. 713-22, Oct. 4, 1973. These guidelines are discussed more fully on pp. 107, 110-11, infra. BRE has limited its function of providing the agencies with guidance to participation in a recruitment subcommittee of the Interagency Advisory Group, which is made up of the personnel directors of the Federal agencies and departments. However, this subcommittee was inactive as of November 1974. Howerton interview, supra note 88.

[98] Id.

[99] The Commission believes that there is no need for such guidance, since its own regional offices have been instructed to allocate resources to recruitment at minority schools. Hampton letter, supra note 7. However, agencies also conduct recruitment at colleges and universities and should be instructed to direct a certain level of these activities at minority schools.

[100] The competitive service consists of all civil service positions in the executive branch, except those statutorily exempted or requiring Senate confirmation for appointment and those not in the executive branch which have been included by statute. 5 U.S.C. § 2102.

[101] 5 C.F.R. § 332.101 et seq.

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[102] If an agency fills a position vacancy by promotion, transfer, or reinstatement, the agency is not required to contact the Commission unless the position is at Grade 16 or above. Selections from within the Federal system must be made according to an agency merit promotion program which complies with the standards of the Commission. A merit promotion program consists of the procedures and policies followed by the agency in selecting candidates for promotion and internal placement. Agencies are required to rank all candidates and select only those ranked as "best qualified," that is having qualifications superior to those minimally required. FPM Chapter 335, Promotion and Internal Placement, Sept. 20, 1968, as partially revised July 1969 and March 1971. The Commission has issued instructions to the agencies which set forth standards to be followed in evaluating candidates. FPM Supp. 330-1, Examining Practices, November 1972. These instructions also apply to the Commission's own examination procedures, which are discussed more fully on pp. 31-55 infra. The Commission's Bureau of Personnel Management Evaluation periodically reviews agencies' examination procedures to determine if they comply with the Commission's standards. These reviews are discussed in Section VI infra.

[103] A position classification is a category of duties and responsibilities which are similar in subject-matter and level of difficulty and which require similar qualifications. 5 U.S.C. § 5102(2)-(4). The Commission prepares standards for classifying positions, which agencies are required to use as the basis for classifying every position within their jurisdictions. 5 U.S.C. §§ 5105-5107.

[104] Grade level is the basis for salary range. A grade consists of all classes of positions at the same level of difficulty and responsibility, although different in subject-matter. 5 U.S.C. § 5102(5). The General Schedule (GS) of salaries is divided into 18 grades, which are statutorily defined according to difficulty and responsibility. 5 U.S.C. § 5104. For a brief description of the grades' salary ranges, see note 43 supra.

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105. Disabled veterans, their spouses if they are unable to qualify, the surviving spouses of veterans, and the mothers of persons who died in military service are, with some exceptions, entitled to 10 additional points above their earned rating if it is a passing grade. All ten point veterans are placed ahead of all other persons on a list of eligibles. Other veterans are entitled to 5 additional points. A veteran is defined as one who served in active military duty during a war or military campaign or during the period April 28, 1952, through July 1, 1955. A person entitled to additional points by virtue of these provisions is a "preference eligible." 5 U.S.C. §§ 2108, 3309, and 3313.

106. Males represent 98.8 percent of the total United States veteran population. Information supplied by the Reports and Statistics Section, Office of the Comptroller, Veterans Administration, Feb. 14, 1975. Despite the sexually discriminatory impact of the veterans preference provision, Section 712 of Title VII, 42 U.S.C. § 2000e-11, specifically exempts any Federal, State, or local veterans preference rights from the statute's coverage.

107. Additional points are added to the scores of veterans not only when they are considered for entry into the Federal service but also when they are considered for any subsequent transfer. As of June 30, 1973, 67 percent of male employees but only 6 percent of female employees in the Federal Government were entitled to veterans preference points. 1973 Annual Report, *supra* note 43, at 62. Thus, there is a discriminatory impact on the opportunities for women at every stage of the selection process. In 1973, a panel of three Federal district court judges held the veterans preference provision to be constitutional. Colemere v. Hampton, No. NC 72-72 (D. Utah, Oct. 11, 1973). As the Commission recently noted "the issue of the impact of the veterans preference laws on the Federal merit system is a matter for the Congress rather than for administrative action by the Civil Service Commission...." Hampton letter, *supra* note 7. The Commission did not indicate whether it had considered recommending any revisions in the law to the Congress.

When the Commission submits a list of certified candidates, the agency is required by law to select one of the three highest ranked candidates unless the Commission sustains the agency's objections to these candidates.[108] During fiscal year 1974, the Commission received 2.2 million and processed 1.8 million applications and referred 1.5 million names of qualified candidates to agencies, from which 231,000 selections were made.[109]

The Commission uses two basic types of examinations for measuring qualifications and ranking applications: (1) written tests and (2) evaluations of written descriptions of experience submitted by the applicant. The Commission calls the former type of examination "assembled" and the latter "unassembled."[110] Slightly more than half of all Federal applicants are tested by an assembled examination.[111]

One of the reasons Congress extended Title VII to cover Federal employment in 1972 was the concern that the Civil Service Commission's examining procedures, both assembled and unassembled, probably did not conform to standards *required of private* employers.[112] When Title VII was originally enacted, the prevailing view assumed that employment discrimination was the result of isolated instances of bigotry; however, as the problem received more attention, it became generally recognized that the exclusion of minorities and women from employment was more often the result of seemingly neutral practices, such as word-of-mouth recruitment systems, and employment tests, the use of which had a far more adverse impact on these groups than nonminority males.[113] In 1971, the Supreme Court held unanimously in Griggs v. Duke Power Co.[114] that Title VII makes unlawful the use of any employment selection standard having an adverse impact on minorities unless such standard can be demonstrated to be manifestly related to job performance. What Title VII requires, the Supreme Court held,

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[108] 5 U.S.C. § 3318.

[109] These data were obtained from the Program Management and Evaluation Division, BRE, CSC, Feb. 5, 1975.

[110] Written tests are administered to applicants assembled at one time and place and are, therefore, called assembled examinations.

[111] Improvements Needed in Examining and Selecting Applicants for Federal Employment, Report to the Congress by the Comptroller General of the United States, Government Accounting Office (GAO), (July 22, 1974) [hereinafter cited as GAO study].

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[112] For example, the Senate Committee on Labor and Public Welfare, in reporting the proposed legislation, concluded that job requirements in the private sector which were similar to those utilized by the Commission

> have often proven of questionable value in predicting job performance and have often resulted in perpetuating existing patterns of discrimination ...The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a very heavy burden in trying to meet such artificial qualifications. (citation omitted)

Legislative History, supra note 42, at 423. The Commission maintains that its selection standards had nothing to do with the enactment of the 1972 amendments to Title VII and had Congress wanted EEOC's standards to apply to the Federal employment it would have assigned the administrative responsibility for overseeing Federal employment to EEOC. Hampton letter, supra note 7.

[113] The recognition that employment discrimination more likely resulted from these types of practices, rather than from intentional exclusion, was one of the reasons Congress amended Title VII to give the EEOC enforcement authority. See Legislative History, supra note 42, at 414. For a discussion of the discriminatory effects of employment testing on minorities, see U.S. Commission on Civil Rights, Clearinghouse Publication No. 10, Employment Testing: Guide Signs not Stop Signs (1968).

[114] 401 U.S. 424 (1971).

> is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. 115

In defining the nature and degree of required justification for procedures adversely affecting minority groups, the Supreme Court gave "great deference"[116] to the guidelines on validating[117] selection standards which the Equal Employment Opportunity Commission (EEOC) had issued in 1970.[118]

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115. Id. at 431.

116. Id. at 434. The Commission maintains that "In actuality, the Supreme Court gave 'great deference' only to the priciple contained in the EEOC guidelines that tests must be job related when there is adverse impact. In fact, the Supreme Court did not define the nature and degree of required justification for procedures adversely affecting minority groups." Hampton letter, supra note 7. The relevant portion of the Supreme Court's opinion in Griggs v. Duke Power Co., supra at 433-34, reads as follows:

> The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference....Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress. (citations omitted)

117. Validation is a term used by psychologists to describe the method used to demonstrate that a selection procedure is related to job performance.

118. 29 C.F.R. § 1607 (1970). See Notes, "Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers," 41 Geo. W. L. Rev. 505 (March 1973).

The EEOC guidelines, which are substantially identical to regulations subsequently adopted by the Office of Federal Contract Compliance (OFCC) of the Department of Labor,[119] require that all selection standards which disproportionately reject minorities or women be demonstrated empirically to have one of three types of validity recognized by the American Psychological Association (APA).[120] The procedure preferred by the APA, EEOC, OFCC, and the Federal courts is that determining criterion-related validity,[121] or a statistical relationship between the test and important measures of actual job performance.[122] In order for a test or other standard to be predictive of job performance, it must be shown to have criterion-related or empirical validity.[123]

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[119] 41 C.F.R. § 60-3 (1971).

[120] 29 C.F.R. § 1607.5; Standards for Educational and Psychological Tests and Manuals, American Psychological Association (APA) 1966; revised, Standards for Educational and Psychological Tests, APA 1974 [hereinafter cited as APA Standards]. The three types of validity recognized by the APA are as follows: (1) content validity, which is demonstrated by evidence that a test, for example, a typing test, is a representative and reliable sample of actual work skills or tasks; (2) criterion-related validity, which is shown by demonstrating a statistical relationship between the test, for example, an intelligence or aptitude test, and some important measure or actual job performance; and (3) construct validity, which is shown by demonstrating a statistical relationship between the test, and some construct, or personality trait, and that the construct is required for satisfactory performance of the job; for example, a test measuring "sociability" of prospective salespersons might have construct validity. *Id.* Both the EEOC and OFCC state a preference for criterion-related validity. 29 C.F.R. § 1607.5(a); 41 C.F.R. § 60-3.5(a).

[121] APA Standards, *supra* note 120, at 27; 29 C.F.R. § 1607.5(a); 41 C.F.R. § 60-3.5(a); Douglas v. Hampton, 338 F. Supp. 18 (D.D.C. 1972), *aff'd in part*, *vacated in part*, No. 72-1376 (D.D. Cir. 1975); Davis v. Washington, No. 72-2105 (D.C. Cir. Feb. 27, 1975). Rogers v. Int'l. Paper Co., Nos. 74-1086, 74-1087, 74-1101, and 74-1115 (8th Cir. Jan. 7, 1975); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017. (1st Cir. 1974) *cert. denied* 43 U.S.L.W. 3551 (Apr. 15, 1975); Walston v. Nansemond County School Board, 492 F.2d 919 (4th Cir. 1973); and United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

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[122] Validation requirements apply not only to paper-and-pencil ability tests but to all techniques for measuring job suitability, including, for example, scored interviews, assessments of application forms, or educational or job experience requirements if such techniques have an adverse impact on minorities or women. 29 C.F.R. § 60-3.2.

[123] APA Standards, *supra* note 120, at 27. CSC maintains that the APA standards do not indicate a preference for criterion-related validity and that the professional psychological community takes issue with the EEOC guidelines' requirement for showing criterion-related validity unless it is technically infeasible to do so. In addition, the Commission believes that "(i)t is neither legally nor professionally necessary for a test to have been shown to have criterion-related validity in order to be related to job performance...." Hampton letter, *supra* note 7. The APA Standards, *supra* note 120, at 27, state that:

> other forms of validity are not substitutes for criterion-related validity. In choosing a test to select people for a job, for example, an abundance of evidence of the construct validity of a test of flexibility in divergent thinking, or of the content validity of a test of elementary calculus, is of no predictive value without reasons to believe that flexibility of thinking or knowledge of calculus aids performance on that job.... Whatever other validity information a manual may include, one or more studies of criterion-related validity must be included for any test developed for prediction and for many tests intended for diagnosis; otherwise, such tests can only be regarded as experimental.

In addition, the EEOC guidelines require employers to show where feasible that tests are not culturally biased; that is, that they do not operate to exclude from lists of eligibles minority or sex groups which perform less well on the test without any corresponding diminution in job performance.[124] The standards promulgated by the APA state that it is essential to show this type of validity, referred to in the EEOC guidelines as "differential validity."[125]

In considering the extension of Title VII to Federal employment, congressional committees in both the House and Senate determined that the Commission's selection and promotion requirements were "...replete with artificial requirements that place a premium on 'paper' credentials...."[126] which were of questionable value in predicting job performance and which may have perpetuated discrimination against women and minorities.[127] The Commission was directed to review its entire examination program to ensure that it conformed to the Supreme Court decision in *Griggs* v. *Duke Power Co.*, which had expressly deferred to the EEOC's guidelines.[128]

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[124] 29 C.F.R. § 1607.5(b). The Commission does not interpret EEOC's Guidelines as addressing the issue of cultural bias. Hampton letter, *supra* note 7.

[125] APA Standards, *supra* note 120 at 43. APA Standards define as "essential" information or procedures which are "needed for most tests in most applications...." *Id*. at 6. The Commission does not interpret the APA's Standards to state that it is essential to determine differential validity. Hampton letter, *supra* note 7.

[126] Legislative History, *supra* note 42 at 84 and 423.

[127] *Id*.

[128] *Id*. at 424.

However, within a few months of the passage of the Act, the Commission issued instructions on employee selection standards which failed to conform to the EEOC guidelines approved by the Supreme Court in Griggs v. Duke Power Co. The Commission's instructions,[129] which, as of December 1974, still applied to all Federal examination procedures, failed to comply with EEOC guidelines in at least three important respects.

First, the Commission did not require that selection procedures be analyzed to determine whether they had an adverse impact on minorities or women. The EEOC guidelines, in contrast, require all private employers to maintain information pertaining to the relative rejection rates of minority and non-minority groups.[130]

Second, the Commission permitted the use of selection procedures shown to have "rational validity,"[131] a type of validity unrecognized by the psychological profession or the EEOC.[132] According to the Commission's instructions, rational validity may be shown where there is documentation that certain steps in the development of the test were carried out in a technically adequate way. These steps are (1) identification of the duties and responsibilities of the job; (2) identification of the qualification standards, or the knowledges, skills, and abilities claimed to be necessary for job performance; and (3) development of appraisal procedures for measuring the qualification standards.[133] In short, once the Commission has identified certain abilities as common elements claimed to be related to job performance, test questions developed by a professional psychologist according to technically adequate procedures, are presumed to measure those abilities.[134] In

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[129] CSC, Testing and Employee Standard Instructions, 37 Fed. Reg. 21552 (1972) C.C.H. Emp. Prac. Dec. ¶ 3890 et seq. These instructions represented no change from the regulations on policies of examination practices issued by the Commission in August 1971. 5 C.F.R. § 300.102, 36 Fed. Reg. 15447 (1971).

[130] 29 C.F.R. § 1607.4.

[131] Testing and Employee Standard Instructions, supra note 129.

[132] See note 134 infra.

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[133] Testing and Employee Standard Instructions, supra note 129.

[134] Neither the APA Standards, supra note 120, nor the EEOC guidelines supra note 118, recognize this type of procedure. The Commission maintains that rational validity, as defined in its procedures, is recognized by the APA standards on p. 26. Hampton letter, supra note 7. The APA standards on p. 26 state that "four interdependent kinds of inferential interpretation are traditionally described to summarize most test use: the criterion-related validities (predictive and concurrent); content validity; and construct validity." In note 3 to that statement, the APA standards indicate that while other terms, including "rational validity," have been used, "any specially-named procedures...should meet the standards of investigation contained in this section." As indicated in note 121 supra, the APA standards clearly require that a test used to predict job performance must be supported by a criterion-related validity study. The Commission's procedures, although used to predict job performance, neither meet the standards of criterion-related validity nor are they shown adequately to sample the job. And according to James C. Sharf, Staff Psychologist at EEOC, "Such procedures measure the person in the abstract and do not meet the Griggs standard of measuring the person for the job." Interview with James C. Sharf, Staff Psychologist, EEOC, Feb. 14, 1975.

Griggs v. *Duke Power Co.*, the Supreme Court categorially rejected a similar approach. In that case, the employer attempted to justify a high school diploma requirement and an intelligence test by showing that a professional psychologist had conducted a proper analysis of the job elements and had determined that the requirements would provide the experience necessary to perform the job.[135] The Supreme Court dismissed the employer's defense, holding that "neither the high school completion requirement nor the general intelligence test [was] shown to bear a demonstrable relationship to successful performance of the jobs for which it is used."[136]

Third, the Commission's instruction did not recognize a need for determining whether examinations are differentially valid. Indeed, the Commission has taken the position that differential validity is a dubious scientific concept and has opposed including differential validity requirements in proposed joint-agency guidelines being developed by the Equal

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[135] Griggs v. Duke Power Co., *supra*, reversing 420 F.2d 1225, 1232 (4th Cir. 1970).

[136] 401 U.S. at 431. The Supreme Court specifically noted that employees who had been hired before the institution of the requirements and who had not earned high school diplomas were not shown to have inferior work records to those employees who had high school educations. *Id*. at 431-32. This is precisely the type of information obtained in a criterion-related validity study. The Commission, whose procedures do not require a showing of criterion-related validity, takes the position that the Griggs v. Duke Power Co. decision "is grossly misrepresented in this discussion" and that "the report's conclusion that our procedures are similar to those rejected in the Griggs decision is simply untrue." Hampton letter, *supra* note 7.

Employment Opportunity Coordinating Council (EEOCC).[137] Although the question of differential validity was not reached in Griggs v. Duke Power Co., Federal courts of appeals have increasingly held that Title VII requires a showing that tests are not culturally biased.[138]

Thus, it is clear that the Commission's instructions on test validation conflict significantly with the EEOC guidelines approved in Griggs v. Duke

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[137] The EEOCC was established pursuant to Section 715 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-14, and consists of the EEOC, Departments of Labor and Justice, the U.S. Commission on Civil Rights, and the Civil Service Commission. The EEOCC's major activity since its establishment has been an attempt to develop uniform Federal guidelines on employee selection. For a more detailed discussion of the EEOCC, see Chapter VI of this report.

[138] See, e.g., Rogers v. Int'l Paper Co., *supra* note 121, Boston Chapter NAACP, Inc. v. Beecher, *supra* note 121, and United States v. Georgia Power Co., *supra* note 121. The Commission, responding to the statement in this report that it does not require differential validity studies, has indicated that "this is correct but in the matter of differential validity the CSC, unlike EEOC, depends on the most recent, authoritative, scientific evidence." Hampton letter, *supra* note 7. In the Commission's judgment, such evidence shows that differential validity is rarely shown. *Id.* In addressing this issue in United States v. Georgia Power Co., *supra* note 121, the Court of Appeals for the Fifth Circuit held as follows:

> Although the significance of the concept of differential validity, viewed scientifically, is the subject of a considerable amount of professional debate, the possible fair employment implications are so great as to require separate racial group validation of tests in a case such as we have here in which there exists an available minority race sample of adequate size to conduct such a study. 'Certainly the safest validation is that which conforms with the EEOC guidelines....'(citations omitted)

Power Co. and subsequent rulings by Federal courts.[139] The Commission took the position in 1974 that these standards did not apply to Federal employment on the grounds that the definition of the term "employer" contained in Title VII[140] does not include "the United States."[141] The Supreme Court, however, in an unanimous opinion rendered in 1974, stated that the legislative history of the 1972 Amendments to Title VII left no doubt that Congress intended to extend to the Federal Government "...the substantive antidiscrimination law embraced in Title VII...."[142] Further, in the first case to rule directly on the question, the U.S. Court of Appeals for the District of Columbia Circuit held in early 1975 that the EEOC validation guidelines apply to the Commission's test.[143] The Commission strenuously opposed this decision, requesting the Department of Justice to petition the Supreme Court for review.[144] As of April 1975, the Commission maintained that the substantive Title VII requirements concerning employee selection standards, as delineated in the EEOC guidelines, were inapplicable to the Federal Government.[145]

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[139] The Commission maintains that its instructions are superior in many respects to the EEOC guidelines. The Commission cites as an example the fact that its instructions apply to all tests, not just those which have a disproportionately adverse impact on women and minorities. Hampton letter, supra note 7.

[140] 42 U.S.C. § 2000e(a) and (b).

[141] Interview with Irvin Kator, Assistant Executive Director, CSC, July 10, 1974; and Carl Goodman, Deputy General Counsel, CSC, Jan. 8, 1975. The Commission's position has been reflected in other aspects of employment discrimination. For example, it has not adopted the Federal court's extremely narrow construction of the bona fida occupational qualification (BFOQ) exception in Title VII for sex discrimination. Instead, the Commission's regulations permit the exception to apply"...in unusual circumstances when the Commission finds the action excluding one sex from a job justified." 5 C.F.R. § 332.408 (1974). The Commission has indicated that sex discrimination is justified in selecting employees for institutional or custodial services for members of one sex or for jobs in locations where sharing of common sleeping quarters is required. FPM Supp. 330-1. Under these regulations, the Commission permitted the exclusion of women from certain correctional officer positions in Federal penal institutions for men. In 1974, this practice was found to be unlawful by a Federal district court, which held that the BFOQ exemption did not apply. Reynolds v. Wise, 375 F. Supp. 145 (N.D. Tex. 1974). By the end of 1974, the Commission had still not revised its regulations. Interview with Helene Markoff, Director, Federal Women's Program, CSC, Dec. 3, 1974.

The Commission's position, which exempts Federal examination procedures from the Title VII requirements upheld by the Federal courts, appears to lack legal justification and fails on policy grounds as well. The Federal Government must not be permitted the continued use of employment selection standards which close the doors to groups victimized by years of discrimination without any empirical proof of such standards'

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142. Morton v. Mancari, supra note 45, at 4937.

143. Douglas v. Hampton, supra note 121.

144. The Washington Post, Apr. 27, 1975, at 2.

145. In April 1975, the Commission indicated that this report misrepresents the governing laws concerning the Commission's legal authority with regard to employee selection standards, and it emphasized that "the EEOC does not have jurisdiction in regard to Federal Government EEO matters. Under the 1972 Act, this authority is, in fact, vested in the Civil Service Commission. The Civil Service Commission has authority to issue testing guidelines applicable to Federal examining procedures and has done so." Hampton letter, supra note 7. The Commission maintains that, although its instructions conflict with those of EEOC, they are "based on Title VII and its job related requirements." Id.

relation to job performance;[146] to do so, would permit the Government to escape adherence to the requirements it, itself, imposes on private employers. Such policy decisions within the Government seriously erode the Government's own credibility as an enforcer of the law.

When Title VII was extended to Federal employment in 1972, the Commission was using a single written test, the Federal Service Entrance Examination (FSEE), to screen applicants for 200 different categories of managerial, technical, and professional jobs in most Federal agencies. In order to be certified as eligible for entry into these types of positions, a person was required to have a college degree or three years of work experience, or some combination thereof, and a score of 70 or more on the FSEE. This basic requirement, instituted in 1955, had been revised in 1967 to permit alternatively the certification of individuals without an FSEE rating, if they had obtained a college degree within the two previous years and had a superior academic record. This alternative was provided to increase the number of certified minority candidates, since the percentage of minorities passing the FSEE was low. However, the revision caused no significant change in the proportion of minority candidates entering the Federal service.[147]

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[146] CSC maintains that its tests do not "close the door" to minority groups. Although it has collected no data on the relative test scores of minority and nonminority groups, CSC believes that the total minority employment in the Federal Government shows that this statement is untrue. *Id.* It is this Commission's view that if the Civil Service Commission's test conformed to the EEOC guidelines the total minority employment in the Federal Government would be greater than is now the case.

In 1971, a lawsuit was brought by black plaintiffs[148] seeking to enjoin the Commission from continuing to use the FSEE, on the grounds that it rejected a disproportionate number of minority applicants and had not been demonstrated to be a predictor of job performance. The Federal District Court found that the FSEE had been adequately validated but ordered that the complaint be remanded to the Commission for processing according to procedures issued by the Commission subsequent to the filing of the lawsuit.[149] On appeal, the EEOC, at the request of the Court, submitted an amicus curiae brief supporting the plaintiffs' contentions that the FSEE had not been shown to be a valid test.[150]

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[147] Minorities entering government service through this provision constituted only about 2 percent of the total FSEE hires. See U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 87-89 (1970). The Commission recently indicated that there is no basis for the statement that the alternative qualifying provision caused no significant change in the proportions of certified minority candidates. Hampton letter, supra note 7. The Civil Service Commission also permitted certification on the basis of scores on the Graduate Record Examination (GRE), administered by the Educational Testing Service of Princeton, New Jersey. Since this test was held to be racially discriminatory and invalid as a predictor of job performance, the Commission withdrew this alternative. Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972).

[148] The plaintiffs were college graduates who were hired for an intern program at the Department of Housing and Urban Development without taking the FSEE. Three of the plaintiffs had been terminated because of their subsequent failure to pass the FSEE, and the remaining five were denied future advancement for the same reason. All of the plaintiffs had received supervisory ratings which indicated their work performance was satisfactory Douglas v. Hampton, supra note 121.

[149] Id. The Commission issued regulations in August 1971 providing for the filing of complaints against agency or Commission examination procedures. 5 C.F.R. § 300.104, 36 Fed. Reg. 15447 (1971).

In February 1975 the Court of Appeals reversed the District Court's ruling on the validity of the FSEE because the Commission had not demonstrated the technical infeasibility of attempting to show empirical validity.[151]

In the meantime, the Commission's Bureau of Policy and Standards had begun to develop a test to replace the FSEE. The Commission's objective was to design a written examination which could be shown by documentation to be job-related and which could be used in screening applicants for a broad range of occupations.[152] The result of this effort was the Professional and Administrative Career Examination (PACE), which was first administered in the fall of 1974.[153]

The PACE examination serves as the chief means of entry into Federal employment for persons with college degrees or equivalent work experience.[154]

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[150] Brief for the United States Equal Employment Opportunity Commission, as Amicus Curiae, Douglas v. Hampton, supra note 121. The Civil Service Commission requested a delay in the proceedings on the grounds that the issue of employee selection was being considered by the Equal Employment Opportunity Coordinating Council.

[151] Douglas v. Hampton, supra note 121.

[152] Interview with Dr. William A. Gorham, Associate Director, Personnel Research and Development Center, CSC, Nov. 19, 1974.

[153] The Commission discontinued use of the FSEE in June 1974 and first administered PACE in November 1974. CSC News Release, June 17, 1974.

[154] To qualify for admission to the examination, an individual must have a college degree, three years of work experience, or some equivalent combination of education and experience. These are the same qualifications which applied to admission to the FSEE.

It was designed to test for five types of abilities,[155] claimed by the Commission to be necessary for successful performance in six occupational categories covering over 50 job titles in the Federal service.[156] There is a

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155. These abilities are described in the PACE application form booklet as follows:

> ...the ability to understand and use written language; the ability to derive general principles from particular data; the ability to analyze data and derive conclusions; the ability to understand, interpret and solve problems presented in quantitative terms; the ability to derive conclusions from incomplete data supplemented by general knowledge; and the ability to discover the logical sequence of a series of events.

Professional and Administrative Career Examination Supplement to Announcement No. 429 (October 1974).

156. The Commission arrived at the five types of abilities through a job analysis process which began with an analysis of important job duties of particular occupations said to be important by over 1,200 persons in those occupations. Six abilities were identified as relevant to the occupations by Commission staff, based on their review of literature and their professional judgment. These six abilities were then rated by Commission psychologists. These ratings were combined with the ratings of the incumbents, and the results were supported by a factor analysis. One ability was dropped because it was determined there was not an acceptable way of measuring it. The research and development of PACE extended over one and one-half years and cost more than one and one-half million dollars. Gorham interview, supra note 152; and Hampton letter, supra note 7.

separate test for each of the five abilities, and a candidate's score on each test is to be given different weight, depending on the position category of the job for which the candidate is being considered.[157] For example, a high rating on the battery testing mathematical ability would be given heavier weight and would, therefore, increase significantly the total score of a candidate when the candidate is considered for a job involving quantitative problem solving. By the same token, a candidate's low score on the battery testing for verbal ability would not be given substantial weight and would not result in a significant reduction in the candidate's total rating, so long as the individual is being considered for a job in which verbal ability is not a critical component. In short, the PACE exam permits evaluation of candidates in the context of a particular type of job. In this respect, it appears to be a substantial improvement over the FSEE, the results of which were interpreted uniformly in screening applicants for 200 different job titles.

However, there is no evidence that PACE actually measures the five abilities it is designed to measure[158] or that a particular score on any of the tests actually predicts job performance in any job. Commission testing experts have indicated that reports will be issued within the next year concerning the validity of PACE, but these reports will not include empirical evidence demonstrating a statistical relationship between test scores and measures of actual job performance.[159]

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[157] Id.

[158] The Commission asserts that there is such evidence. Hampton letter, supra note 7.

[159] Gorham interview, supra note 152. This type of evidence is required under Title VII unless it is technically infeasible to obtain. Douglas v. Hampton, supra note 121.

The Commission will also undertake some criterion-related validity studies over the next four years, in an attempt to show the empirical validity of PACE with regard to 12 of the 50 job titles for which it is used to screen applicants.[160] However, the Commission's studies will be based on a concurrent validation approach, rather than the preferred predictive validation methodology. A concurrent study is conducted by administering the test to current employees and then obtaining measures of the job performance of these employees. A predictive study is performed by administering the test to applicants and then obtaining measures of these persons' job performance after the passage of time. A predictive validation methodology thus permits the analysis of the job performance of persons who do not score well on written tests.[161] The Federal courts have uniformly recognized that inferences may not necessarily be drawn about the expected job performance of test failures from the performance of those who pass an examination.[162] According to the APA Task Force on Employment Testing of Minority Groups, a predictive validation methodology should be used when conducting studies involving minority groups.[163] Both the EEOC and OFCC employee selection guidelines require that predictive studies be conducted unless technically infeasible.[164] The Commission maintains that it is not technically feasible to conduct such a study in Federal employment because the Government is prohibited, by law, from hiring any but those among the best qualified.[165] Yet, clearly, if PACE is not a valid predictor of job performance, then candidates with lower scores may not be excluded, on the basis of the test, from the best qualified category. The Civil Service Commission is clearly not prohibited from doing what must be done in order to determine whether in fact its examining procedures are identifying not the persons who can make the highest score in a test but the persons who are best qualified to do a particular job.

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[160] Gorham interview, supra note 152.

[161] APA Standards, supra note 120, at 27. See also M.D. Dunnette, Personnel Selection and Placement, 114-17 (1966).

[162] See, e.g., Davis v. Washington, supra note 121; Boston Chapter NAACP, Inc., v. Beecher, supra note 121; and United States v. Georgia Power Co., supra note 121. CSC takes the position that "there is neither a legal nor a professional reason to do predictive studies...." Hampton letter, supra note 7.

Largely because of congressional criticism expressed in conjunction with the passage of the 1972 Amendments, the Commission began a limited review of other examination procedures in November 1972. In addition to standardized tests, such as PACE, unassembled examination procedures are used by the Commission to screen candidates.[166] The Bureau of Recruiting and Examining (BRE) evaluated samples of rating schedules for 110 representative positions used in the Commission's regional offices to identify elements that it believed might discriminate against minorities and women.[167] BRE's review was not systematic, however, because it collected no statistical data to determine whether the application of any of these schedules resulted in an adverse impact on females or minority group members.[168]

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[163] APA Task Force on Employment Testing of Minority Groups, Job Testing and the Disadvantaged 24 Am. Psych. 645 (1969). CSC maintains that it is not the position of the psychological profession that only predictive studies should be used. Hampton letter, supra note 7. In addition, this task force report, in the opinion of the Commission, did not find that concurrent validity studies are inappropriate for minority groups. Id.

[164] 29 C.F.R. § 1607.5(a); 41 C.F.R. § 60-3.4(c)(1).

[165] Gorham interview, supra note 152.

[166] Unassembled examinations consist of evaluations of written descriptions of experience submitted by applicants.

The BRE analysis found a few practices which had a discriminatory impact on minorities or women. BRE reported that the sampled rating schedules frequently placed too much emphasis on specific types of work experience or education and training and failed to assess applicants according to the particular job-related skills or knowledge, regardless of how acquired. BRE also found that schedules too often penalized applicants for training received through programs for the disadvantaged and for the method of entry into an occupation. Some rating schedules were also found to penalize candidates for having had part-time or intermittent experience, a practice which would unfairly screen out female applicants, according to BRE.[169]

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167. CSC Operations Memo. No. 337-36, Nov. 20, 1972. This review was conducted as a part of the Commission's "Action Plan for Implementation of Public Law 92-261, the Equal Employment Opportunity Act of 1972," CSC Operations Memo. No. 713-25, Aug. 16, 1972.

168. Interview with Donald Holum, Chief, Office of Examination Plans, BRE, CSC, Jan. 9, 1975.

169. Id.

The BRE report, issued in April 1973, concluded that the identified problems would be corrected by increased emphasis on evaluating candidates according to specific job-related skills, knowledges, and abilities. It encouraged regional and area offices to follow more systematic procedures for identifying and measuring job-related factors and for documenting the procedures followed.[170] In September 1973, BRE issued instructions to the area and regional offices which stressed the need for documenting analyses of job duties and the conclusions reached by Commission staff on qualification standards.[171] In effect, these instructions merely made more specific the basic steps to be followed in establishing "rational validity." No instructions were issued concerning the need for showing a statistical relationship between candidates' ratings and their subsequent performance on the job.

BRE also began to develop an experimental system for preparing rating schedules designed to reflect important job components of particular positions and more precisely to measure candidates according to qualities related to these job components.[172] Under the current system, rating schedules merely consist of general descriptions of education and experience deemed necessary for the job, with indications of which types and levels of experience and education should warrant a higher ranking for the candidate. For example, under current rating schedules, a candidate for the job of engineer automatically is credited with certain points for having obtained a college degree in engineering.[173]

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[170] Id. The Commission maintains that this:

> discussion does not fully reflect our efforts to assure that our rating procedures are job related....No recognition has been given to the fact that the Commission's unassembled evaluation procedures have always been based on practical requirements. We have issued instructions to our field offices, where most rating schedules are developed, to sharpen the procedures followed in determining job requirements and in assuring that measures of applicant qualifications are held throughout the country on the implementation of these instructions. Examining offices must fully document the basis for these decisions. Hampton letter, *supra* note 7.

[171] CSC Operations Memo. No. 332-68, Sept. 18, 1973.

[172] Interviews with Donald Holum, Chief, Office of Examination Plans, BRE, Jan. 30 and Feb. 5, 1975.

BRE's experimental system, which applies the "job element" method, begins with the identification of important and measurable qualities said to be necessary for successful performance in a particular position, such as "ability to write clearly." Persons employed in the particular occupation, called "occupation specialists" by the Commission, make this identification.[174] Ultimately, the essential qualities are to be listed on application forms, with instructions to candidates to describe their education and experience which would show that they have these qualities.

Preliminary rating schedules are developed by the Commission staff, listing specific examples of education and various types of experience which should indicate candidates' relative qualities. For example, ability to write clearly may be indicated by a showing of job experience in report writing, concentrated college coursework in journalism and writing or completion of a graduate level thesis. The rating schedules provide that a numerical score be assigned to each type of experience. Following the development of

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173. Hampton letter, supra note 7.

174. This identification is called a "job analysis," which includes not only a definition of the work tasks but also the employee behaviors required. See Dunette, supra note 161, at 69.

the preliminary schedules, actual applicants are ranked by Commission staff and the occupation specialists separately. If differences appear in the two sets of rankings, adjustments are made in the schedules if the factors given weight by the occupation specialists are "rationally" related to the job components.[175] As of February 1975, only two of the more than 300 total position classifications in the civil service[176] had this type of rating schedule.[177]

The fundamental flaw in the new system is its failure to provide for validating the schedules by comparing candidates' rankings with their subsequent job performance. Instead, validity is apparently inferred from a correlation between the rankings of the occupation specialists, based on their judgment, and the rankings of the Commission staff, based on the rating schedules.[178] According to prevailing professional views on examining procedures,[179] the collection of the specialists' views on necessary qualities should be only the first step in the development of rating schedules. In order to test whether the schedules examine for qualities essential to job performance, which is clearly required under Title VII,[180] the Commission must, at a minimum, conduct empirical studies comparing ratings with the actual job performance of an adequate sample of candidates receiving a variety of scores.[181]

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[175] Holum interviews, supra note 172.

[176] The Standards Division of the Bureau of Policies and Standards estimated the total number of position classifications to be 328 in February 1975.

[177] Rating schedules had been develop[illegible] for the positions of Equal Opportunity Specialist and Recreation Specialist. [illegible]um interviews, supra note 172.

[178] Id.

[179] See Dunette, supra note 161, [illegible] 68-84, and APA Standards, supra note 120, at 29-31.

[180] Douglas v. Hampton, supra note 121.

During approximately the same time period in which BRE conducted reviews of the Commission's ratings schedules, the Government Accounting Office (GAO) conducted an analysis of the Commission's unassembled examination process and found strong evidence that it did not provide reliable indicators of merit.[182] Reratings by Commission staff of previously evaluated applications were found to vary by an average of more than five points. The GAO found that such minor variation in score could affect a candidate's standing by 50 places or more and, thus, the unreliability in ratings could have a substantial effect on hiring practices.[183] The ratings were not sufficiently precise, in the opinion of GAO, to distinguish among candidates, unless there was a wide disparity in score. Candidates within similar ranges of score could not be predicted to perform any differently on the job. In addition, the GAO found that candidates receiving identical scores were ranked according to the arbitrary factor of alphabetical order in reverse.[184]

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[181] In addition, the Commission should undertake an investigation of possible differences in criterion-related validity for ethnic, race, and sex groups. APA Standards supra note 120, at 43.

[182] GAO study, supra note 111. By definition, a testing device which is unreliable is not predictive of job performance.

[183] In response to the GAO findings, the Commission initiated some of the changes described above. As of February 1975, the GAO had not conducted a second analysis to determine if these actions had led to any results. Telephone interview with Donald Goodyear, Assistant Director, Federal Personnel and Compensation Division, GAO, Jan. 30, 1974.

The GAO study concluded that the law requiring appointing officers to select only one of the three top-ranked candidates, the so-called "rule of three,"[185] probably results in the exclusion of well-qualified candidates and should, therefore, be changed to permit agencies to consider and fill positions from among all candidates in ranges of scores.[186] The GAO study suggested that one aspect of the selection system adopted by the Michigan Civil Service Commission in 1973 might serve as a model on which to base an alternative system for the Federal service.

In 1971, the State of Michigan completed an indepth study which found that there was serious underutilization of minorities and women in the State government and that its selection procedures were not in accordance with the standards set forth by the Supreme Court in Griggs v. Duke Power Co.[187] As a result, the State Civil Service Commission adopted a "rule of reliability," which permitted the selection of applicants from ranges of scores, the range depending on the degree of reliability of the examination. The implementation of this rule had the effect of increasing to some extent the representation of minorities and women on certification lists of eligible candidates.[188] Another change implemented by the State of Michigan, which the GAO study did not consider, was a policy of "expanded certification." This policy permitted hiring officials to select minorities or females below the top three ranked candidates, where the civil service test forming the basis for the ranking had not been validated according to EEOC guidelines, where the State agency had an approved affirmative action plan, and where the hiring official certified that the selected candidate was equal to or better qualified than any of the top three. Michigan viewed the policy as providing a temporary mechanism essential for overcoming the unlawfully discriminatory impact of unvalidated selection devices.[189]

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[184] Id.

[185] 5 U.S.C. § 3318. The Civil Service Act of 1883 required only that appointments be made from those persons highest graded. However, the Commission soon adopted a policy of restricting consideration to the top three ranked candidates, and this policy eventually became law in the Veterans Preference Act of 1944, 58 Stat. 389, 5 U.S.C. § 3318.

[186] GAO study, supra note 111.

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[187] Griggs v. Duke Power Co., supra note 114. Letter from James H. Blair, Executive Director, Michigan Department of Civil Rights, to Arthur Flemming, Chairman, U.S. Commission on Civil Rights, Nov. 29, 1974.

[188] Telephone interview with Ernest Wallack, Director, Special and Regional Services Division, Michigan Department of Civil Service, Jan. 23, 1975. The Commission takes the position that "there is nothing psychometrically sound in the 'rule of reliability.' Rules concerning numbers of candidates to be certified are generally arbitrary decisions and can be set at any level which is administratively feasible. The narrower the rule, the more the validity of the examination is presumed." Hampton letter, supra note 7. The Michigan procedure permits the number of persons to be considered for a job to increase as the presumed validity of the test decreases. This procedure could be adopted in the Federal service, since there is no empirical basis for presuming that the Federal selection standards identify those candidates who will perform successfully on the job. The "rule of three" is the type of arbitrary requirement which does not permit consideration of candidates who might be determined to be better qualified on the basis of a valid test. Action by the Congress would be required in order to change the "rule of three."

The National Civil Service League, an organization which has spearheaded merit system reform since 1881,[190] has recommended a similar approach. Concluding that no ranking procedures have yet been developed which are sufficiently valid indicators of job performance, the League included in its 1970 Model Public Personnel Administration Law a provision permitting hiring officials to make selections from lists of all candidates certified as qualified, rather than from only the highest ranked. By 1974, this so-called "pass-fail certification" system had been adopted by almost 40 percent of State and local civil service systems.[191] The League further took the position that, because of past discrimination, preference may be given to hiring minorities and women who are certified as qualified:

> Just as the public jurisdictions helped the nation to repay the debt to returning war veterans it is important now that they help repay a debt resulting from years of public employment deprivation for minority group members, by giving preferential treatment to members of minority groups.[192]

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[189] Blair letter, supra note 187. See also Guidelines for Implementation of Expanded Certification Policy adopted May 10, 1972 by the Civil Service Commission, Memorandum from Sidney Singer, Michigan State Personnel Director, to All Appointing Authorities, Personnel Officers and Recognized Employee Organizations, Nov. 27, 1973. The U.S. Civil Service Commission found the Michigan policy to be a violation of the Merit System Standards, 45 C.F.R. § 70, which are required of State agencies receiving grants through certain Federal programs, and therefore, notified Michigan State agencies that they would be required to ignore the expanded certification policy as a condition for the continuation of any Federal grants under the Merit System Standards Program. Blair Letter, supra note 187.

[190] For a description of the influence of the League on the development of the Federal civil service, see Van Riper, supra note 3.

[191] J.J. Couturier, Executive Director, National Civil Service League (NCSL), A Citizens Action Success Strategy for Social Reform: Case Study of a "Model Law," Good Government, NCSL, Fall 1974.

[192] Model Public Personnel Administration Law, reproduced in NCSL's publication, Good Government (Fall 1974). See also J.J. Couturier, Executive Director, NCSL, Civil Rights in Civil Service--the Winds of Change, Pub. Admin. Rev. 224, Oct. 15, 1973.

As the U.S. Commission on Civil Rights has previously stated,[193] the Civil Service System permits many subjective factors to enter the selection process, such as applicants' personality, experience, and judgment.

> Unfortunately, a significant reason for the paucity of minority group persons and women in many job categories is that these subjective factors never included providing a fair share of employment opportunities to them....One of the requirements, therefore, is that in the subjective evaluations that always occur in the selection process, one factor previously excluded should now be included--a concern that a reasonable number of qualified minorities and women be hired until equity is attained. [194]

The Civil Service Commission has taken the position that it is not a violation of merit principles for State and local governments to certify candidates in "broad quality categories rather than through the more precise ranking techniques."[195] The Commission, however, asserts that it is barred from adopting such a procedure, since Federal law requires it to rank all candidates according to their ratings.[196] Even if the Commission determined that it could permit consideration of candidates from broader ranges of scores, it takes the position that the granting of any preference, even if temporary in nature to remedy the effects of past discrimination, is unconstitutional and a violation of Title VII as well. Such a system, the Commission maintains, is based on quotas which "have always been abhorred by those who truly have supported concepts of equality and civil rights and liberties."[197]

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[193] U.S. Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities 22 (February 1973). CSC, while admitting that subjective factors may enter into the selection of candidates by hiring officials, maintains that its approach:

> to the examination process is to utilize reasonably objective measures (e.g., kind and level of qualifying experience or education) of the skills, knowledges, and abilities and other worker characteristics which have been identified through job analysis as being required for satisfactory performance of job duties. While a degree of subjectivity enters into the creation and use of these (or any) kinds of measures, we attempt to minimize subjective variance through detailed instructions and illustrative examples in our rating schedules. Hampton letter, supra note 7.

[194] Statement on Affirmative Action for Equal Employment Opportunities, supra note 193.

[195] "Cooperative Recruiting and Examining," FPM Supp. 150-73.

The positions taken by the Commission with respect to its selection standards and the granting of preference to minorities who are qualified appear to be in complete conflict with the weight of Title VII law. The Commission screens out and ranks thousands of applicants annually on the basis of examinations, both assembled and unassembled, which have not been demonstrated empirically to predict job performance.[198] Applicants rejected because of these selection devices may, in fact, be capable of equivalent or superior performance to those appointed. Since the Commission has not demonstrated the validity of its procedures, it has no scientific basis on which to assert that candidates, at least within ranges of scores, are not equally qualified. The vast majority of Federal courts have held that similar selection procedures used by both private and public employers are illegal and have, therefore, ordered the granting of preferential treatment on a temporary basis to remedy the effect of the unlawful discrimination.[199] As the first circuit Court of Appeals has stated,

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[196] Gorham interview, supra note 152; 5 U.S.C. § 3313. In addition, the Commission requires Federal agencies either to rank all candidates consecutively or to place them in ranked categories. FPM 335, Subchapter 3, Merit Promotion Plans, Sept. 20, 1968.

[197] Hampton Letter, supra note 7. The Commission strongly opposes the view that it should strive toward proportional representation in the Federal work force. It states:

> Since such a concept, which requires discrimination on the basis of race and sex, has been rejected at the highest levels of government and is contrary to law and to the Fourteenth and Fifth Amendments to the Constitution, most CSC activity will seem less than optimal to CRC staff as it is not directed toward personnel management by quotas. Such a perspective is unfortunately reflected in the proposed CRC report. We find this performance yardstick to be severely wanting and would be greatly disturbed if it were to find its way into a report that will be reviewed by so many of our citizens. Id.

See also, Memorandum from Robert E. Hampton, Chairman, CSC, to Heads of Departments and Agencies on the Use of Employment Goals and Timetables in Agency Equal Employment Opportunity Programs, May 11, 1971.

> It is by now well understood...that our society cannot be completely colorblind in the short term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed.... Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.[200]

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[198] The Commission does not accept the conclusion drawn here that Title VII requires job relatedness to be demonstrated by an empirical relationship between the test and job performance. Hampton letter, *supra* note 7.

[199] *See*, *e.g.*, NAACP, Inc. v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974); Associated General Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973) *cert. denied*, 416 U.S. 957 (1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm., 497 F.2d 1113 (2d Cir. 1974), *petition for cert. filed* (Nov. 5, 1974). Commonwealth of Pennsylvania v. Sebastian, 480 F.2d 917 (3rd Cir. 1973); and Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). In Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973), however, the court affirmed a Federal district court's refusal to order the establishment of hiring quotas where the court's order provided an alternative remedy which assured that minorities would be selected; the district court's order required the employer to select from the list of qualified candidates on a random basis, rather than according to rank, and to give preference to Baltimore city residents, who were disproportionately minority persons. The Commission does not agree that its tests are similar to those held to be unlawful in these cases. Moreover, it notes that the ordering of temporary preferential treatment to remedy the effects of unlawful tests has not been considered by the Supreme Court, which has indicated, in Griggs v. Duke Power Co., *supra* note 114, that Title VII does not require the hiring of a person solely because he has been the subject of discrimination. Hampton letter, *supra* note 7.

[200] Associated General Contractors of Mass., Inc. v. Altshuler, *supra* note 199, at 16.

To eliminate the vestiges of past, invidious discrimination and to achieve the goal of a truly representative government bureaucracy, the selection system in the civil service must provide for this type of action.

IV. Processing Title VII Complaints

Prior to the extension of Title VII coverage to Federal employment, the Commission had issued regulations governing employment discrimination complaints brought under Executive Orders 11246 and 11478.[201] In 1971, congressional committees in both the House and Senate strongly criticized the Commission's complaint procedures and determined that they may have actually denied employees impartial investigations and fair consideration. Bias against complainants appeared to the committees to be inherent in the procedures, since the allegedly discriminatory agencies were responsible for investigating the complaints and rendering final decisions, unbound by the findings of the hearing officers. Agencies' final decisions were appealable to the Commission's Board of Appeals and Review (BAR), but were affirmed in most cases.[202] Finally, the committees found that the complaints system, as well as other parts of the Federal Equal Employment Opportunity (EEO) program, had been seriously weakened by the Commission's narrow view of discrimination as primarily a problem of individual bigotry rather than the result of systemic practices.[203] The Senate committee, whose provisions on

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[201] 5 C.F.R. § 713.211, _et_ _seq_. (1969).

[202] Legislative History, _supra_ note 42, at 84 and 423.

[203] _Id_. The Commission's complaint procedures were also strongly criticized in a report prepared by Ralph Nader's Public Interest Research Group in June 1972. See M.W. Brewer, Jr., Public Interest Research Group, _Behind the Promises: Equal Employment Opportunity in the Federal Government_ (1972).

Federal employment ultimately passed, reported that the new Title VII authority was "...intended to enable the Commission to reconsider its entire complaint structure and the relationship between the employee, agency and Commission in these cases."[204]

As indicated in the discussion below, almost three years after the enactment of this legislation, the Commission's regulations were still fundamentally biased against the employment discrimination complainant, for many of the same reasons recognized by the congressional committees in 1971. In addition, the Commission's interpretations of complainants' substantive and procedural rights were in many respects contrary to the requirements of Title VII.[205]

The Commission regulations in effect in 1975[206] set out detailed steps which aggrieved persons must follow in challenging employment discrimination in Federal employment.[207] Following an informal process, complaints proceed through formal investigation and a hearing, if requested by the complainant, and are then subject to final decision by the agency head or other designated official. Complainants may file a civil action in U.S. district court after 180 days from the initiation of the complaint or after final agency action. They may also appeal the agency's final decision to the Commission's Appeals Review Board.[208]

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[204] *Id*. at 423.

[205] The Commission maintains that parts of the 1972 Amendments to Title VII "were drafted to accommodate specifically to the" complaint system existing at the time of the enactment of the legislation. "Therefore," the Commission believes, "the basis for the report's conclusion that the system and the rights granted to Federal employees and applicants are contrary to Title VII requirements is difficult to find." Hampton letter, *supra* note 7.

[206] 5 C.F.R. § 713.211 *et seq*. (1974). The regulations adopted in 1969 were only slightly revised in 1972 following the enactment of the 1972 Amendments to Title VII. 5 C.F.R. § 713.211 *et seq*., 37 Fed. Reg. 22717 (Oct. 21, 1972). A listing of the revisions made at that time is found in FPM Letter No. 713-17 (Attachment 1), Nov. 3, 1972. For a discussion of the revised complaint regulations, *see*, Brief for the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund as Amicus Curiae, Laurel v. United States, *appeal docketed* No. 74-3746, 5th Cir. 1974. Further revisions were made in the regulations in 1974 to include provisions for the processing of complaints alleging discrimination on the basis of age, pursuant to Public Law 93-259 (effective May 1, 1974). FPM Letter 713-28, July 9, 1974.

These procedures do not apply to general allegations of discrimination unrelated to a specific individual, which are made by an individual complainant or a third party.[209] When complaints are made alleging discrimination against a class, the agency is required only to establish a file and to notify the complainant of its decision, which the complainant may appeal to the Commission within 30 days. There is no requirement that the agency conduct an investigation, nor are any time limits set for agency action.[210] Complainants are not permitted access to the investigatory file until the case is closed, and there is no right of appeal to the Appeals Review Board.[211] Further, the Commission regulations do not acknowledge that complainants raising general allegations have the right to file a civil action in court.[212] During the first quarter of fiscal year 1975, approximately 25 general allegation complaints had been referred to the Commission for review.[213] However, complainants challenging an agency's employment practice, for example, a job requirement which may adversely affect a minority group, may pursue the challenge through the regular complaint procedures.[214] However, when an employment practice required by the Commission is challenged, the complaint may be made in the form of an appeal to the Commission.[215] The Commission has failed to cross-reference these provisions in the standard complaint regulations; thus, many complainants are unaware that they may challenge broad practices in their complaints.[216]

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[207] Employee complaints alleging improper agency actions on grounds other than race, ethnic, or sex discrimination are processed according to entirely different procedures which provide for a hearing before the Commission, but no right of appeal to the Commission's highest reviewing authority, the Appeals Review Board - 5 C.F.R. § 772. These procedures apply to employees' challenges to adverse actions such as termination, probation, or pay classification. Complainants frequently are faced with having to elect which of these procedures to follow in challenging an adverse action which they believe to be racially or sexually discriminatory.

[208] The name of the Board of Appeals and Review was changed in 1974 to the Appeals Review Board.

[209] 5 C.F.R. § 713.212(b).

[210] 5 C.F.R. § 713.251. There are no procedural requirements governing the conduct of such investigations.

[211] FPM Letter No. 713-20 (Jan. 27, 1975).

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[212] 5 C.F.R. § 713.281.

[213] The Commission did not begin to collect data on the total number of such complaints filed nationally until fiscal year 1975. In the Washington, D.C., area alone, 14 general complaints were reviewed during fiscal year 1974. In only two instances was the agency's decision reversed. In one of these cases, the agency was ordered to establish a Sixteen Point Program. The Sixteen Point Program, now called the Spanish Speaking Program, is discussed on p. 108 _infra_. In the other instance, the agency was instructed to discontinue requiring a job qualification which was related to a single recruitment source. Interview with Paul Leslie, Chief, Washington Operations Division, Bureau of Personnel Management Evaluations, CSC, Nov. 13, 1974.

[214] 5 C.F.R. § 300.104(c).

[215] 5 C.F.R. § 300.104(a). An appeal is made to the Appeals Review Board whose decision is final, subject to discretionary review by the Commissioners. 5 C.F.R. § 772.401; 5 C.F.R. § 772.308. In at least two instances, court challenges to the Commission's entrance examinations have been dismissed or remanded for failure of the complainants to exhaust these administrative procedures. Douglas v. Hampton, _supra_ note 121; League of United Latin Am. Citizens v. Hampton, 501 F.2d 843 (D.C. Cir. 1974). To date, there have been few complaints filed with the Commission pursuant to these regulations. _See_ In Re Shirley Long, Appeals Review Board, CSC, Nov. 13, 1972 (finding improper a job requirement by the U.S. Park Police that candidates weigh a minimum of 145 lbs. and have a minimum height of 5'8").

Although Title VII includes no restrictions on the filing of a complaint against a Federal agency, the Commission has imposed stringent conditions. The Commission regulations bar applicants[217] or employees from initiating individual complaints unless an informal complaint is first registered within 30 days of the date on which the allegedly discriminatory act occurred.[218] In addition, the complainant must allege a specific act of discrimination.[219] The complaint is treated informally by an Equal Employment Opportunity Counselor, who is directed to seek resolution of the matter within 21 days. If informal measures fail, the counselor must inform the aggrieved person of the right to file a formal written complaint within 15 days of the notice.[220]

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[216] Interview with Charles Ralston, Attorney, NAACP Legal Defense and Educational Fund, Mar. 20, 1975.

[217] The Commission strictly construes the definition of applicant for employment. It has held, for example, that a person who takes a Federal Government basic entry examination but who has not applied for employment at a specific agency is not an applicant with the Civil Service Commission or other agency and, therefore, may not file a complaint. Appeals Review Board Decision in Case No. 713-74-278, Dec. 11, 1973.

[218] The current regulations do not contain a provision included in previous regulations which permitted the filing of a complaint at any time if the alleged discrimination was continuing in nature. Compare 5 C.F.R. § 713.213 (1969) with 5 C.F.R. § 713.214 (1972). Title VII complainants may file discrimination charges with the EEOC against private employers or State and local governments within 180 days of the date of the alleged discriminatory act, 42 U.S.C. 2000e-5(e), but the statutory time limitation has been held not to apply in cases charging continuing discrimination. Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1235-6, (N.D. Ga. 1969), rev'd on other grounds, 421 F.2d 888 (5th Cir. 1970). Federal complainants, however, must comply with the Commission's strict time limitations unless they can show good cause for the delay. 5 C.F.R. § 713.214(a)(4). Thus, a Federal complaint was rejected as untimely where a female alleged continuing sex discrimination in promotion practices on the grounds that her complaint was filed 247 days after the most recent denial of promotion to her. Appeals Review Board, Decision in Case No. 713-74-291, Dec. 17, 1973. The Commission's position barring complaints alleging continuing discrimination is squarely in conflict with Title VII law. The Commission believes that "the requirement for timely filing of complaints benefits all parties as it permits a comprehensive investigation of recent events which are still fresh and reconstructible in the witnesses' minds." Hampton letter, supra note 7.

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[219] Hampton letter, supra note 7. Despite congressional criticism of the Commission's tendency to view the problem of discrimination as one of individual actions and to ignore systemic discrimination, the Commission, nevertheless, conditions its complaint procedures on the allegation of a specific act of discrimination. See Legislative History, supra note 42, at 423.

[220] The Commission maintains that "the great majority of EEO-related issues of concern to employees are resolved informally, and some form of corrective action is taken by the agency as a result of over one-third of these contacts with counselors." Therefore, the Commission believes that this process is "an effective means of resolving problems quickly and informally and substantially reducing the number of issues which need to be processed through the formalized complaint system and the courts." Hampton letter, supra note 7. On the other hand, there may be some question whether complainants are fully informed at this stage of the nature of the discrimination they may have experienced or of the relief to which they may be entitled. Ralston interview, supra note 216.

In the past, from 10 to 11 percent of all informal complaints developed into formal complaints:

	Number of Persons Counseled	Number of Formal Complaints
Fiscal Year 1972	16,883	1,834 (11%)
Fiscal Year 1973	26,627	2,743 (10.3%)
Fiscal Year 1974	31,484	3,435 (10.9%) [221]

The vast majority of formal complaints in each fiscal year alleged race discrimination, followed in frequency by allegations of discrimination on the basis of sex, national origin, and religion.[222]

When a complaint is filed, the head of the agency or designated official may reject any portion of the complaint which is of a general nature and not related to the individual.[223] In fiscal year 1974, 10 percent of final complaint dispositions reported by agencies were rejections of complaints.[224] The Commission has not issued clear guidelines specifying what types of allegations are "unrelated" to an individual complaint.[225] It has consistently held, however, that complaints alleging discrimination against a particular class of employees, of which the complainant is a member, are not within the purview of the standard complaint procedures.[226] In contrast, class and individual discrimination claims under Title VII have historically been treated simultaneously, since the Federal courts have long held that employment discrimination is, by definition, class discrimination.[227] From the complainant's standpoint, severance of class issues from the individual claim in the administrative process can be extremely detrimental because it may preclude collection and introduction of evidence relating to the class which may be highly material to the individual's case.[228]

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[221] Memorandum to Irving Kator, Assistant Executive Director, CSC, from Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Aug. 23, 1974. Approximately 35 to 45 percent of the informal complaints were followed by some "corrective action," but not necessarily any specific relief to the complainant. Id. An analysis of corrective actions taken by agencies in fiscal year 1973 found that these measures most frequently consisted of an "improved personnel practice," promotion, reduction or rescission of adverse action, training opportunities, or reassignment. The next most frequently occurring corrective actions were reinstatement, priority consideration for promotion, improved EEO practices, and removal of adverse material from official personnel folders. Telephone interview with Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Nov. 25, 1974.

[222] Race discrimination complaints represented 68.4 percent of the total formal complaints in fiscal year 1972, 61 percent in fiscal year 1973, and 60.3 percent in fiscal year 1974. The respective figures for the other bases were as follows: sex-female, 16 percent, 20 percent, 21.7 percent; sex-male, 3.6 percent, 4 percent, 6.3 percent; national origin, 9.1 percent, 10 percent, 9.5 percent; religion, 2.6 percent, 5 percent, 4.3 percent. Hudson memorandum, supra note 221. The Commission's tabulation of complaints did not indicate the number of complaints alleging both sex and race or national origin discrimination.

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[223] 5 C.F.R. § 713.215. The complainant may challenge such a rejection by appealing to the Commission or by filing a civil action. Id.

[224] Of 2,650 dispositions, 265 were rejections. Hudson memorandum, note 221.

[225] The Commission has merely indicated that allegations of discrimination which do not fall within the purview of the regulations are those not filed by an employee or applicant for employment in the agency where the act occurred, do not relate to an employment matter over which the agency has jurisdiction, or are not based on race, color, sex, religion, or national origin. FPM Letter No. 713-213, Sept. 21, 1973. The Commission has indicated that "each complaint must be considered on its own merits. What may be an 'unrelated' allegation in one complaint may well be the core of another complaint." Hampton letter, supra note 7.

[226] See, for example, Appeals Review Board, Decision in Case No. 713-74-275, Dec. 10, 1973. The complainant alleged that an agency policy of controlling grade escalation, which applied to only two job classifications, was discriminatory on the basis of sex, since virtually all employees in the two classifications were women. The complainant was an employee in one of the two job categories. Similarly, a Native American employee denied a promotion filed a complaint alleging discrimination against Native Americans in promotions; the class allegation in the complaint was rejected. Appeals Review Board, Decision in Case No. 713-74-289, Dec. 17, 1973. Since the Commission does not permit the regular processing of class-wide complaints, some Federal district courts have held that a class action law suit is barred. See, e.g., Pendleton v. Schlesinger, No. 1689-73 (D.D.C. Aug. 9, 1974). In November 1974, the NAACP Legal Defense and Educational Fund filed a lawsuit challenging the Commission's practice of severing class allegations from individual complaints. Barrett v. United States Civil Serv. Comm'n, Civil No. 75-1694 (D.D.C. Nov. 20, 1974). See also, letter from William P. Berzak, Chairman, Appeals Review Board, to Allen Black, NAACP Legal Defense and Educational Fund, Oct. 18, 1974, which affirmed that the Commission does not permit individuals to include class discrimination allegations in their individual complaints.

The rule of rejecting portions of complaints not previously raised also appears to be contrary to the historic treatment of Title VII complaints. Charges before the EEOC have generally been broadened, where appropriate, to encompass like and related issues to the one raised by the charging party.[229] This practice was adopted by EEOC and upheld by the courts on the grounds that victims of employment discrimination most often do not comprehend the complex sources of that discrimination.[230] There is no reason to believe that Federal employees are any different.

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[227] See, e.g., Oatis v. Crown Zellerbach, 398 F.2d 496, 499 (5th Cir. 1968); Jenkins v. United Gas Corp. 400 F.2d 28, 33 (5th Cir. 1968).

[228] Interview with Roderick Boggs, Federal Employment Project, Washington Lawyers Committee for Civil Rights Under the Law, Mar. 19, 1974. In private employment discrimination cases, statistics showing the relative status of the entire class are relevant to the individual discrimination complaint. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

[229] See, e.g., Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

[230] See, e.g., Danner v. Phillips Petroleum Co., 447 F.2d 159, 161-2 (5th Cir. 1971). Although matters not expressly raised by the Federal employee in the informal complaint may be rejected from the formal complaint, matters not expressly raised in the formal complaint may be subsequently investigated if they relate to the "work situation." 5 C.F.R. § 713.216(a).

If a complaint is not rejected, it is then the responsibility of the agency's Equal Employment Opportunity Officer to provide for the complaint investigation.[231] Complainants are not given the right to influence the scope or method of the investigation. The regulations do not require that investigators be certified or trained in employment discrimination matters, but only that they be employees from a part of the agency not subordinate to the agency official in charge of the unit in which the complaint arose.[232] Until September 1974, the Commission provided agencies with investigators on a reimbursable basis. Effective September 3, 1974, agencies were required to assign their own staffs to investigations.[233] Thus, despite congressional concern expressed in 1971 that there was an inherent bias in the complaint investigation procedures, Commission regulations still provide that the investigation be conducted by employees of the allegedly discriminatory agency.[234]

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[231] 5 C.F.R. § 713.216.

[232] Id. Investigators of Federal Title VII complaints may be persons with investigative experience or those who work in occupations requiring investigative skills, such as attorneys, auditors, personnel management specialists, or management analysts. FPM Letter No. 713-34, supra. The Commission provides training for agency investigators, and has proposed a rule which would require certification by the Commission. Hampton letter, supra note 7.

[233] FPM Letter No. 713-34, June 1974. However, between September 1973 and April 1975, the Commission conducted 18 investigations on the requests of agencies and between December 1974 and April 1975 assumed jurisdiction of 62 complaint investigations because of undue delay by agencies. Hampton letter, supra note 7. The Commission's policy is to conduct investigations for agencies where there is a potential conflict of interest, publicity or outside interest, or where the agency is small. Id.

[234] In 1973, this Commission recommended that the Civil Service Commission reevaluate its regulations providing for investigations by agency personnel, since there were serious questions about the impartiality of such investigators. See, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: A Reassessment 55 (1973). The Commission sees no basis for the statement that there is inherent bias in the investigation process. Hampton letter, supra note 7.

Commission regulations further provide that the investigation include a thorough review of the general work environment in which the complaint arose and a comparison of the "...treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred...."[235] This provision ignores the possibility that the complaint may have arisen in an organizational segment in which there was discriminatory segregation of one class.[236] It further militates against proper analysis of the work force, since the complainant's group is to be compared with the aggregate of all other groups rather than with each separate group.[237] In addition, the term "organizational segment" is not defined to indicate clearly how broad or restricted the investigation should be.

The Commission issued guidelines in 1971 explaining in more detail how complaint investigations are to be conducted.[238] These investigation guidelines suffer from a number of deficiencies, only a few of which

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235. 5 C.F.R. § 713.216.

236. For example, a complaint may arise in an all-female clerical pool or in an all-black mail room. The Commission does not believe this provision to be deficient because the term "organizational segment" may be interpreted very broadly. Hampton letter, supra note 7.

237. An analysis might find, for example, that 40 percent of minorities and 20 percent of nonminorities are concentrated in the lowest four grades. If the complainant is a minority female, the investigation should compare the condition of minority females separately with that of nonminority females, minority males, and nonminority males in order to determine the disparity between the status of minority females, and the other groups. In a typical situation, this analysis would find that 50 percent of minority females, 40 percent of nonminority females, 30 percent of minority males, and 5 percent of nonminority males are concentrated in these grades. Thus, the disparity between the complainant's group and the group with the best status is a difference of 45 percent, rather than 20 percent. For data showing the composition of the work force in the lowest four grades, cross-tabulated by race and sex, see CSC, Manpower Statistics Division, Bureau of Manpower Information Systems, Federal Civilian Personnel Statistics: Federal Civilian Employment by Minority Group and Sex, Nov. 30, 1972.

238. Investigating Complaints of Discrimination in Federal Employment, CSC, Oct. 1971 /hereinafter cited as Investigation Guidelines/.

would be eliminated in revised draft guidelines circulated in November 1974.[239] The most serious deficiency in the current guidelines is their failure to include a correct definition of the meaning of discrimination. The guidelines implicitly adopt a definition limiting discrimination to overt acts or patterns of "unfair treatment."[240] The guidelines in draft stage in 1974 did not correct this deficiency,[241] despite the well established rule under Title VII that illegal discrimination includes not only disparate or unfair treatment, but also neutral treatment which had a disparate effect on any ethnic, racial, or sex group, unless justified by some compelling, nondiscriminatory purpose.[242]

Second, the guidelines generally limit the scope of the investigation to the actions and decisions of the allegedly discriminatory agency official and to the organizational segment in which the complaint arose.[243] The proposed new guidelines would permit extending the investigation to other units under the same administrative jurisdiction but not to the agency as a whole.[244]

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[239] Draft Investigation Guidelines (undated), provided by Mr. Anthony W. Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Nov. 1, 1974 /hereinafter cited as Draft Investigation Guidelines/.

[240] The current guidelines state that the investigation should be sufficiently comprehensive to uncover any evidence of overt discrimination and should develop enough information to bring out...any pattern of nonselection or unfair treatment of members of the complainant's group which might constitute evidence of discrimination...." Investigation Guidelines, *supra* note 238, at 5.

[241] The draft guidelines state that "A pattern of discrimination is established by evidence which shows disparate treatment of members of the complainant's group when compared with the treatment of members of other groups." Draft Investigation Guidelines, *supra* note 239, at 29-30.

[242] Griggs v. Duke Power Co., *supra* note 114.

[243] Investigation Guidelines, *supra* note 238, at 9. This limitation can operate severely to the disadvantage of the complainant, since statistical evidence based on the agency as a whole has been held to be highly material to an individual's case. *See*, *for example*, Robinson v. Warner, No. 1654-23 (D.D.C., June 24, 1974) in which the court supplemented the administrative record with statistical evidence based on the entire Navy Command Systems Support Activity and reversed the agency's final determination of nondiscrimination.

Third, the guidelines on investigating complaints arising in the selection or promotion process fail to include essential instructions on investigating a personnel action. The guidelines merely instruct the investigator to list the name, sex, race, or ethnicity of each of the candidates and their relative ranking. There are no instructions to investigate the possibility of systemic discrimination in the ranking itself or in the process by which candidates were placed on the certificate list of eligibles.[245] The proposed new guidelines indicate that the investigator should "...consider the need for looking into the reasons why the complainant did not appear on the certificate or was not rated high enough to be within reach on the certificate,"[246] but they do not include instructions on the method by which this investigation should be conducted.[247] Neither the current nor proposed guidelines contain any instructions concerning the investigation of qualification standards which may have had an illegally discriminatory effect on the complainant.[248]

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[244] Draft Investigation Guidelines, supra note 239, at 30.

[245] Investigation Guidelines, supra note 238, at 15-17. The failure to include such an analysis in an investigation can seriously injure the complainant. For example, a black female who was the only black in her division and who had been passed over for promotion three times and for training opportunities two times was held not to have been subjected to race discrimination on the grounds that the selection panel's decision was based on "documentary appraisals and evaluations" and the personal knowledge of the candidates by the three panel members, two supervisors and the selecting official. Appeals Review Board, Decision in Case No. 713-74-284, Dec. 13, 1973. Race discrimination can easily occur in supervisors' appraisals of employees. See, e.g., Rowe v. General Motors, 457 F.2d 348 (5th Cir. 1972). Yet, the Commission made the decision in the above case without any indication that an investigation had been made of the evaluations and ratings given black applicants and employees by the agency. The Commission maintains, however, that the procedures for investigating promotion actions are adequate because they determine how and why each candidate is ranked. Hampton letter, supra note 7.

[246] Draft Investigation Guidelines, supra note 239, at 11.

Finally, both sets of investigation guidelines suffer from extreme vagueness. For example, both instruct the investigator to determine whether there exists "...any improper segregation of personnel by reason of their membership in the group alleged to have been discriminated against,"[249] but there is no explanation of the meaning of the term "improper." Similarly, the investigator is instructed to collect "information about the agency's merit promotion plan and procedures, if needed for an understanding of the case."[250] However, there are no criteria included for determining the relevance of such information, or for evaluating a merit promotion system to determine compliance with the dictates of Title VII.

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247. *Id*. at 39-43.

248. In reviewing individual complaints, the Commission does not consider the job relatedness of a particular selection standard which rejected the complainant. The draft guidelines propose to prohibit the inclusion in the investigative file of any Commission Job Element Guides or rating schedules. *Id*. at 15. This information could be essential to challenging the job relatedness of a qualification standard.

249. Investigation Guidelines, *supra* note 238, at 10; Draft Investigation Guidelines, *supra* note 239, at 31.

250. Investigation Guidelines, *supra* note 238, at 17; Draft Investigation Guidelines, *supra* note 239, at 42.

The new guidelines in draft stage as of November 1974 contained two distinct improvements over the current guidelines in that they emphasized the importance of the investigator's maintaining independence from the agency's officials[251] and that they permitted the investigator to collect information relevant to a basis of discrimination other than that charged by the complainant.[252] The revisions to the 1971 version of the Guidelines were prepared without consulting with EEOC,[253] despite a clear request from Congress in 1972 that the Commission obtain EEOC's advice on equal employment matters.[254]

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[251] Draft Investigation Guidelines, supra note 239, at 12. The draft guidelines would prohibit specifically, for example, the disclosure of the investigative file to these officials during the investigation. Id.

[252] Id. at 26. Permitting this flexibility to the investigator is important, since it is not uncommon for a complainant to allege one basis of discrimination, e.g., sex discrimination, when in fact she or he may be the victim of race or ethnic discrimination as well.

[253] Hudson telephone interview, supra note 221. The Commission consulted with representatives from agency internal EEO programs, including representatives from EEOC. However, the Commission did not consult with the EEOC Office of Compliance. Hampton letter, supra note 7.

[254] Legislative History, supra note 42, at 425. The Commission's staff indicated that EEOC was not consulted concerning the revision because the Commission perceived that the two agencies had basic differences in approach to investigations. According to the Commission's staff, Federal complaint investigators are to look for evidence that individuals received disparate treatment; the Commission's staff felt that EEOC investigations were directed primarily to collecting statistical evidence on the class as a whole. Hudson telephone interview, supra note 221. For a discussion of EEOC investigations, see Chapter V infra. EEOC investigations, in fact, appear to entail collection of both types of information. There is a strong reason to believe that Congress intended that the basic approach of the Commission be more like that of EEOC in all matters and that the Commission utilize the reservoir of talent and expertise available within the EEOC for improving Federal complaint and other equal employment programs. Legislative History, supra note 42, at 425.

Commission regulations require the agency to make a second attempt to resolve the complaint informally following the completion of the investigation.[255] If an adjustment of the complaint is not obtained, the complainant is to be notified of the proposed disposition by the agency and of the right to request a hearing within 15 days of the notification.[256] In fiscal year 1974, slightly less than 25 percent of the complainants whose cases were decided had requested and received a hearing.[257]

Hearings are closed proceedings[258] conducted by a complaints examiner, who is certified by the Commission[259] and who must be an employee from another agency except in unusual circumstances.[260] The complainant has the right to be represented by counsel[261] and to cross examine witnesses but not the right to obtain information other than that collected by the agency or to subpoena documents or witnesses.[262] The hearing is not to be an adversarial proceeding but rather an extension of the investigation.[263]

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[255] 5 C.F.R. § 713.217(a). The complainant is entitled to review the investigation file.

[256] 5 C.F.R. § 713.217(b).

[257] Hearings were held in 643 of the 2,650 cases which received final dispositions during fiscal year 1974. Hudson memorandum, supra note 221; Hudson telephone interview, supra note 221.

[258] Only persons directly connected with the complaint may attend. 5 C.F.R. § 713.218(c)(1). However, the allegedly discriminatory official is not entitled to be present. Discrimination Complaints Examiners Handbook, Office of Federal Equal Employment Opportunity, Apr. 1973, at 36.

[259] 5 C.F.R. § 713.218(a). Complaints examiners must meet the qualifications established in the Commission's GS-930 (Hearings and Appeals) Series, which is applicable to most hearing officer positions not subject to the Administrative Procedure Act. A law degree is not required but may substitute for work experience in adjudicating cases. Expertise in Title VII law or employment discrimination matters is not required. Memorandum to J. Philip Bohart, Acting Director, Personnel and Labor Relations Division, from H. Alan McKean, Chief, Standards Division, Apr. 1, 1974. This certification standard was adopted in conjunction with a reorganization of the employee appeals system within the Commission and the establishment of the Federal Employee Appeals Authority. The reorganization primarily affected the system through which employees appeal adverse personnel actions and did not change any of the appeal provisions pertaining to discrimination complaints. CSC, New Federal Employee Appeals System (undated).

To assist complaints examiners, the Commission issued an examiner's handbook in April 1973, which gives instructions on preparing for and conducting a hearing, admitting and evaluating evidence, and writing recommended decisions.[264] Although the Discrimination Complaints

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[260] Where an agency is prevented by law from disclosing to persons without security clearances information concerning the matter complained of, the complaints examiner may be an employee of the agency. 5 C.F.R. § 713.218(a).

[261] With respect to representation by counsel, the Commission on Civil Rights recommended in 1970 that free legal assistance be provided on request to all employees who require it. Enforcement Effort report, supra note 147, at 358. The Civil Service Commission has not implemented such a program in the ensuing 5 years.

[262] The complaints examiner has the authority to require agencies to produce witnesses requested by the complainant when the complaints examiner determines that the testimony is "necessary" and where it is not "administratively impracticable" for the agency to comply with the request. 5 C.F.R. § 713.218(e). Both the agency and the complainant have the right to submit evidence in the form of documents, affidavits, or testimony of witnesses. Discrimination Complaints Examiner Handbook, supra note 258, at 85, 87. The complainant may also request that the examiner request evidence or testimony. If the examiner denies the request, reasons must be given in the record.

[263] Discrimination Complaints Examiners Handbook, supra note 258, at 5. See also, letter from Robert E. Hampton, Chairman, CSC, to Arthur F. Sampson, Acting Administrator, General Services Administration, June 18, 1973.

[264] Id.

Examiners Handbook was issued more than a year after Title VII became applicable to Federal employment, it contains no guidelines or information on substantive Title VII law.[265] In addition, the Handbook's instruction concerning the meaning of discrimination and questions of burden of proof are contrary to the weight of authority under Title VII. The Handbook describes discrimination exclusively in terms of disparate treatment[266] and provides that complainants have the initial burden to present evidence of disparate treatment. The weight of Title VII law, however, does not place the burden on plaintiffs to show disparate treatment; instead, plaintiffs are held to make out a *prima facie* case of illegal discrimination by presenting statistical evidence showing a disparity in the employment status of the alleged discriminatees and other employees.[267] The Commission's handbook does not indicate that Federal Title VII complainants have access to this procedure in the context of the administrative hearing.[268] If the record establishes that disparate treatment has occurred, then the examiner is instructed to view the evidence most favorably to the agency and to make a finding of discrimination if a reasonable mind could not infer from the evidence so viewed that the agency's action was free from discrimination on the basis of race, color, sex, religion, or national origin.[269] In short, the instructions lead a reasonable person to believe that the complaints examiner is instructed to apply a standard which gives the benefit of the doubt to the allegedly discriminatory agency.

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[265] The Commission does, however, provide a digest of Title VII cases for complaints examiners. Hampton letter, *supra* note 7.

[266] *Id.* at 57, 62. As noted on p. 72 *supra*, Title VII reaches not only disparate treatment but neutral treatment which has a disparate impact.

[267] *See e.g.*, McDonnell Douglas Corp. v. Green, *supra* note 228; Rowe v. General Motors Corp., *supra* note 245; Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

[268] Complaints examiners frequently exclude evidence proffered to show discrimination against the complainant's class and such actions are routinely affirmed by the Appeals Review Board. *See e.g.*, Appeals Review Board Decision in Case No. 713-73-593 (June 14, 19[illegible]).

The findings and recommendations of the complaints examiner are not binding on the agency unless the examiner recommends a finding of discrimination and the agency has not issued a final decision within 180 days after the complaint was filed.[270] If the agency rejects or modifies the decision recommended by the complaints examiner, or if the agency's decision is made when a hearing is not requested, it must set forth the specific reasons for its final action.[271] During fiscal year 1974, 7 percent of final agency dispositions made a finding of discrimination.[272]

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[269] Discrimination Complaints Examiners Handbook, supra note 258, at 62. The Handbook states as follows:

> Where the record shows disparate treatment, the Examiner must then evaluate the evidence and assemble the facts which tend to establish a case free from discrimination based on the complainant's race, color, religion, sex, or national origin. If a reasonable and unprejudiced mind could not infer from the facts so assembled that the agency was free from discrimination in the matter, then the Examiner should make a finding of discrimination. Id.

[270] 5 C.F.R. § 713.220(d); § 713.221(b).

[271] 5 C.F.R. § 713.221. However, the Commission has held that an agency's failure to provide specific reasons for its action does not invalidate the decision if the ARB provides reasons in its review. Minutes of Civil Service Commission, Feb. 27, 1974, declining to reopen Appeals Review Board Decisions Nos. 713-73-595, 713-74-179, and 713-74-43.

[272] A finding of discrimination was made in 170 of 2,650 dispositions. Hudson memorandum, supra note 221. Final dispositions include rejections or cancellations of complaints. Findings of discrimination constituted 12.8 percent of all decisions on the merits. Complaints examiners made findings of discrimination more frequently than did agencies. In the 643 cases which went to a hearing, complaints examiners recommended a finding of discrimination in 109 (16.9 percent) cases. Agencies adopted contrary findings in 26.6 percent of these cases. CSC, Office of Federal Equal Employment Opportunity, Performance by Agency and CSC Complaints Examiners in EEO Discrimination Complaint Cases During FY 1974 (undated).

Commission regulations require that agencies proceed with the processing of complaints without "undue delay" so that complaints are resolved within 180 days after filing, including time consumed by a hearing.[273] However, in fiscal year 1974, the Government-wide average time spent processing a complaint was 201 days, which was 26 days longer than that of fiscal year 1973.[274] Some major agency complaint processing procedures averaged well over 300 days.[275]

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[273] 5 C.F.R. § 713.220.

[274] Memorandum to Irving Kator, Assistant Executive Director, CSC, from Anthony Hudson, Director, Office of Federal Equal Employment Opportunity, CSC, Precomplaint Counseling and Discrimination Complaint Activity During Fiscal Year 1974, Aug. 23, 1974. Agencies whose average complaint processing time in fiscal year 1974 exceeded 180 days were as follows: Department of Agriculture (214 days); Department of the Army (211 days); Atomic Energy Commission (317 days); Department of Commerce (256 days); Defense Contract Audit Agency (307 days); Defense Supply Agency (211 days); Environmental Protection Agency (259 days); Equal Employment Opportunity Commission (296 days) Federal Communications Commission (856 days); General Services Administration (212 days); Department of Health, Education and Welfare (367 days); Department of Housing and Urban Development (369 days); Department of the Interior (197 days); Department of Justice (250 days); Department of Labor (253 days); National Aeronautics and Space Administration (254 days); National Labor Relations Board (296 days); Selective Service System (370 days); Small Business Administration (252 days); Department of Transportation (395 days); U.S. Information Agency (238 days); and U.S. Postal Service (189 days). Agencies whose average complaint processing time in fiscal year 1974 met the 180-day limit were as follows: Administrative Office of U.S. Courts, U.S. Air Force, Army and Air Force Exchange, Civil Service Commission, Commission on Civil Rights, Federal Maritime Commission, General Accounting Office, Government Printing Office, National Guard Bureau, National Science Foundation, Department of the Navy, Office of Management and Budget, Smithsonian, Department of State, Tennessee Valley Authority, Department of the Treasury, and Veterans Administration. During fiscal year 1974, there were no complaints filed against ACTION, Agency for International Development, Civil Aeronautics Board, Defense Communications Agency, Defense Intelligence Agency, Defense Mapping Agency, Defense Nuclear Agency, Federal Power Commission, National Gallery of Art, National Mediation Board, National Security Agency, Office of Economic Opportunity, or U.S. Soldiers Home. *Id.*

[275] See, for example, HEW, HUD, DOT, cited in note 275 *supra.*

Title VII authorizes the Federal complainant to file a civil action in U.S. district court if the agency does not make a decision within 180 days or within 30 days of the final agency action.[276] A complainant may delay civil action by appealing to the Commission's Appeals Review Board[277] for a review of the record.[278] In fiscal year 1974, approximately 30 percent of agencies' final dispositions of complaints were appealed to the Appeals Review Board.[279] In approximately 75 percent of these cases, the agency decision finding no discrimination or rejecting the complaint was affirmed.[280] In slightly more than 10 percent of the cases, the Board remanded the complaint to the agency for further investigation,[281] and in approximately 7 percent the appeal was cancelled by the complainant.[282] The Board reversed agencies' rejections of complaints and findings of no discrimination in 5.5 percent of the total decisions rendered.[283]

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[276] 42 U.S.C. § 2000e-16c. A civil action may be filed within 30 days after final agency action or final action by the Commission if the complainant elects to appeal to the Commission.

[277] The Appeals Review Board, formerly called the Board of Appeals and Review, consists of nine members appointed by the Chairman of the Commission. Board members are career civil servants who serve at the pleasure of the Chairman. As of November 1974, the Board consisted of 6 anglo males, 1 black male, 1 Spanish surnamed male, and 1 black female. The Board members, all of whom are attorneys, are assisted by a staff of 21 examiners and 15 clerical workers. None of the staff or Board members, as of November 1974, had had any previous experience in Title VII law. Interview with William Berzak, Chairman, Appeals Review Board, Nov. 7, 1974.

[278] There is no right to a hearing before the Board, although it will receive written arguments in addition to the record compiled below. 5 C.F.R. § 713.234; Berzak interview, supra note 277.

[279] 808 of the 2,650 final dispositions were appealed to the Board during fiscal year 1974. Appeals Review Board, Receipts and Production: EEO Appeals (Oct. 26, 1974).

The Board reviews the record to determine if it shows that the complainant was subjected to disparate treatment.[284] It does not consider discrimination in the form of disparate impact. If disparate treatment is shown, the burden is then shifted to the agency to come forward with evidence that the treatment was justified by some lawful purpose, such as Commission or agency qualification standards. An agency's decision finding no discrimination will be upheld if the evidence in the record supports the conclusion that the disparate treatment was justified.[285] The Board does not follow or refer to judicial decisions interpreting the substantive or procedural requirements of Title VII, nor does it follow the rule of stare-decisis with regard to its own prior decisions.[286]

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[280] 575 of 778 Board decisions affirmed agencies' decisions finding no discrimination or rejecting the complaint. In fiscal year 1973, 585 of 692 Board decisions (or 84.5 percent) affirmed agencies' decisions. Appeals Review Board, Receipts and Production, *supra* note 279.

[281] 82 of 778 Board decisions were in this category. In fiscal year 1973, only 3.6 percent of Board decisions (25 of 692) remanded cases to agencies. *Id*.

[282] *Id*. In 1973, only 1.4 percent of Board final dispositions were the result of cancellations by complainants.

[283] *Id*. In an additional two percent of the decisions, the Board recommended that further corrective action be taken by agencies. The remaining decisions reversed agency decisions on the grounds that improper procedures had been followed (.8 percent) or rejected the appeal as untimely (.5 percent).

[284] The Board's definition of "disparate treatment" appears to be extremely narrow. It has held, for example, that "favoritism" is not a form of discrimination prohibited by law or regulations. Appeals Review Board Decision in Case No. 713-74-285, Dec. 17, 1973, wherein the complainant alleged that supervisors showed favoritism to white employees.

Although it is well settled under Title VII law that the complainant need not show direct proof of intentional discrimination and that a statistical disparity shifts the burden to the employer to show evidence of non-discrimination, the Board does not apply this standard. In one case decided in 1973, the Board correctly followed this standard but was reversed by the Commission.[287]

The 1972 Amendments to Title VII gave the Commission express authority to order reinstatement, back pay, and other relief to persons found to be victims of discrimination.[288] Commission regulations provide that a person denied employment or promotion shall be given priority consideration for any existing vacancy where the record shows that discrimination existed when the selection was made.[289] However, such persons are not entitled to back pay or other retroactive relief unless the record shows that the person would have been selected but for the impermissible discrimination.[290] The Commission's rule, which places a heavy burden of proof on complainants seeking retroactive relief, is completely contrary to the weight of Title VII case law, which holds that once discrimination has been found, the employer has the burden of showing that the victim would not have been selected even in the absence of the illegal discrimination.[291] As a result of the Commission's restrictive interpretation of the

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[285] Telephone interview with William Berzak, Chairman, Appeals Review Board, CSC, Nov. 27, 1974. If, however, the record is not sufficiently complete, the Board may remand the case or conduct an independent review.

[286] The decisions of the Appeals Review Board are largely ad hoc dispositions which do not refer to prior decisions of the Commission or any substantive rules of law. The Commission does not publish these decisions but merely makes them available at headquarters and certain regional offices.

[287] Minutes of the Civil Service Commission, Nov. 14, 1973, reversing Appeals Review Board Decision No. 713-73-465.

[288] 42 U.S.C. § 2000e-16(b).

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289. 5 C.F.R. § 713.271.

290. Id. Thus, the Commission has held that where sex discrimination was found in the denial of a promotion to a female complainant, she was not entitled to retroactive relief, even though she was the top ranked candidate for the position, on the grounds that she might have been denied the promotion on grounds other than sex, since hiring officials have some limited discretion. Appeals Review Board, Decision in Case No. 713-74-437, Mar. 14, 1974. Similarly, where racial discrimination was found in the ratings made by a promotion panel, the black complainant, who was ranked second best, was not given back pay or other retroactive relief, since the record did not show that but for the ratings, the complainant would have been selected. Appeals Review Board, Decision in Case No. 713-74-277, Dec. 10, 1973.

291. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). In late 1974, a Federal district court ruled that the Commission's standard on retroactive relief was improper. Day v. Weinberger, No. 74-292 (D.D.C. Nov. 4, 1974). The Commission maintains that its position comports with a decision by the Court of Claims in 1971, Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971). Hampton letter, supra note 7. However, the district court in Day v. Weinburger specifically noted that the Chambers decision was no longer applicable because it was rendered prior to the passage of the 1972 amendments to Title VII.

remedial authority it has been given in Title VII, full relief is rarely provided to discriminatees. In fiscal year 1973, retroactive relief was provided in 22 (or 3 percent) of 778 cases in which action was taken to correct discrimination.[292]

Thus, it is clear that Federal Title VII complainants face severe disadvantages throughout the complaint process. The allegedly discriminatory agency not only has control over the content of the complaint's allegations but over the investigation as well. While the complainant has a right to a hearing before an independent examiner,[293] the complainant's rights are limited in that proceeding, and the finding of the hearing examiner is not binding on the agency in most cases. The final decision made by the allegedly discriminatory agency is appealable to the Commission, but is not subject to a review according to Title VII case law. More importantly, the substantive rights guaranteed under Title VII, as well as important Title VII evidentiary and procedural rules, are not available to the Federal complainant. Finally, when a civil action is filed in court, the complainant may well not be

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292. Hudson telephone interview, supra note 221. Hampton letter, supra note 7.

293. Since complaints examiners are paid by the allegedly discriminatory agency, an argument could be made that the examiners are not totally independent. Discrimination Complaints Examiners Handbook, supra note 258. The Commission emphasizes, however, that the examiner is referred by the Federal Employee Appeals Authority which is reimbursed by the agency for the examiner's service. Thus, the examiner is not paid directly by the agency. Hampton letter, supra note 7.

given a full trial, but only a review of the administrative record.[294] Three years after the passage of the 1972 Act, it did not appear that the extension of Title VII to Federal employment had led to any meaningful changes in the handling of complaints or the substantive rights of Federal employees to be free from discrimination.[295]

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[294] As of April 1975, the courts were divided on the question of whether Section 717(c) of Title VII, as amended, 42 U.S.C. § 2000e-16(c), gives Federal employees the right to a trial *de novo* or only to a review of the administrative record. *See, e.g.*, Sperling v. United States, No. 79-1533 (3rd Cir. Apr. 18, 1975); Henderson v. Defense Contract Servs. Administration, 370 F. Supp. 180 (S.D.N.Y. 1973) (holding that a right to a trial *de novo* exists). *Contra* Salone v. United States, No. 74-1975 (10th Cir. Feb. 21, 1975); Hackley v. Johnson, 360 F. Supp. 1247 (D.D.C. 1973), *Appeal docketed*, No. 73-2072, D.C. Cir. Oct. 17, 1973.

[295] The Commission maintains that it is incorrect to state that complainants face severe disadvantages throughout its procedures. "The rights of the complainant," the Commission maintains, "are fully safeguarded and the Commission standards are in fact more favorable to the complainant than is required by the courts under Title VII proceedings in the private sector." Hampton letter, *supra* note 7. In addition, the Commission emphasizes that no Federal court has yet found the procedures inconsistent with Title VII. *Id.*

V. Reviewing Affirmative Action Plans

Federal agencies have been required to maintain positive equal employment programs since the issuance of Executive Order 11246 in 1965.[296] Although the Commission was charged with supervising the conduct of such programs and with periodically reviewing agency accomplishments, it refrained from formally approving or rejecting affirmative action plans even after its authority was expanded in 1969 by Executive Order 11478.[297]

The 1972 Amendments to Title VII required that the Commission review and approve plans on an annual basis.[298] In addition, agencies were required for the first time to submit regional plans, as well as national plans. The statute states that these plans must include, but not be limited to, provisions for employee training to promote individual advancement and a description of the qualifications of EEO personnel and of the allocation of resources to the EEO program. The Commission, in turn, has issued instructions on the minimum requirements for all annual plans.[299]

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[296] Exec. Order No. 11246, Part I, supra note 39. The Commission's enforcement of Executive Order 11246 is discussed in Enforcement Effort report, supra note 147, at 144.

[297] Executive Order No. 11478, supra note 41. The Commission's enforcement effort with regard to agency affirmative action plans under Executive Order No. 11478 is discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: One Year Later 5-13 (November 1971); and in The Federal Civil Rights Enforcement Effort--A Reassessment, supra note 234, at 45-50.

[298] 42 U.S.C. § 2000e-16(b).

[299] FPM Letter No. 713-22, Oct. 4, 1973. The basis for these instructions was provided in a memorandum from Robert E. Hampton, Chairman, CSC, to the Heads of All agencies and Departments, May 11, 1973.

The Commission's affirmative action guidelines are substantially weaker than the requirements imposed on Federal contractors under similar Executive orders.[300] Each Federal contractor is required, by law, to conduct a work force analysis of its employment to determine if there are fewer women or minorities in each job title than would be expected by their availability for the job.[301] Availability is to be determined by considering a number of factors, including the percentage of women and minorities in the area work force, those having the necessary job-related skills[302] for the position, and those who would have these skills with available training. If this analysis shows that women and minorities are underutilized in the contractor's work force, the contractor is required to develop numerical goals and timetables designed ultimately to eliminate the underutilization in each job title. Once ultimate goals are established, the contractor is to develop annual hiring and promotion objectives, which are percentages of the total number of job opportunities expected to be created each year.[303]

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300. Exec. Order No. 11246, supra note 39, as amended by Exec. Order No. 11375, supra note 40 . Part I of Executive Order No. 11276, which pertained to Federal employment, was superseded by Executive Order No. 11478, supra note 41 . Pursuant to Executive Order No. 11246, as amended, the Office of Federal Contract Compliance of the Department of Labor has issued regulations requiring most Federal contractors to maintain written affirmative action plans. 41 C.F.R. § 60-2.

301. 41 C.F.R. § 60-2.11

302. If a skills requirement or other selection standard disproportionately excludes minorities or women, it must be shown to be job related according to Executive order regulations on validation procedures. 41 C.F.R. § 60-3.

303. Id. See also 41 C.F.R. § 60-60 and Memorandum from Philip J. Davis, Director, OFCC, to Heads of All Agencies, Technical Guidance Memo. No. 1 on Revised Order No. 4, Feb. 22, 1974.

In order to accomplish its annual and ultimate goals, the contractor must develop a multi-faceted affirmative action program. The numerical objectives are a guide for determining whether the affirmative action plan is effective in eliminating underutilization. When a contractor is reviewed by a compliance agency, an analysis is conducted of the extent to which the contractor has attained its annual and long-term goals. Determination of whether a contractor is in compliance with the Executive orders, however, is not judged exclusively by whether it reaches its objectives but rather by whether its efforts to reach its goals, through implementing the affirmative action plan, have been sufficient and in good faith.

In contrast, the Commission's guidelines do not require Federal agencies adequately to assess the disparities in their employment profiles, or to develop goals or annual objectives for eliminating such disparities, or to report on any progress made in improving the status of minority and female employment in their work forces.[304] Instead, as is discussed below, the Commission's guidelines emphasize the development of vaguely described personnel programs which the Commission presumes will create meaningful equal employment opportunity for all groups.

Despite repeated urging by this agency since 1970,[305] the Commission has refused to require all Federal agencies to develop numerical goals and timetables. The Commission's position, adopted in 1971,[306] continues to be that agencies are permitted, but not required, to adopt such affirmative action objectives on their own initiative, so long as the objectives are based on the current supply of qualified minority groups and women in the recruiting area. In refusing to require that Federal agencies set measurable objectives for integrating all levels of Federal employment, the Commission has failed to carry out fully its responsibility under Title VII and the Executive order for ensuring that all possible measures be taken to eliminate job discrimination in the Federal service.

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[304] The Commission sees little real difference in philosophy between its guidelines and the regulations imposed on Federal contractors with respect to affirmative action because in the Commission's view, it directs Federal agencies to identify "potential sources of qualified minorities and women [which] appear to have not been fully tapped." Hampton letter, supra note 7.

[305] See Enforcement Effort report, supra note 147, at 1,076; Enforcement Effort: One Year Later, supra note 297, at 5-7; Enforcement Effort: A Reassessment, supra note 234, at 15.

The Commission reviews approximately 90 national and 1,200 regional agency affirmative action plans each year. According to the Commission's requirements, approximately half of the Federal agencies develop plans on a fiscal year basis, while the remainder develop plans on a calendar year basis.[307] Fiscal Year national plans are due on May 1 of each year, and calendar year plans are due on November 1. Regional plans for each agency are to be submitted to the Commission's regional offices 90 days after the due date for the agency's national plan.[308] Not all agencies meet their deadlines, however. Of the 47 national plans due on May 1, 1974, for example, only 13 were submitted on time.[309] Twenty-five plans were submitted within two months of the due date, while nine were two months late or more.[310] The Commission generally gives approval to plans within one or two months of receipt.[311] As of November 8, 1974, however, eight of the 47 plans due May 1 had still not been approved, either because the plan was submitted late or because the agency had still not made the changes in the plan which had been recommended by the Commission.[312] Of the 47 plans due on November 1, 1974, only eight had been submitted as of November 8, 1974.[313]

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[306] Memorandum from Robert E. Hampton, Chairman, CSC to Heads of All Agencies, May 11, 1971. See also FPM Letter No. 713-22, Oct. 4, 1973.

[307] FPM Letter No. 713-22, Oct. 4, 1973 (Appendix I).

[308] Id.

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[309] Office of Federal Equal Employment Opportunity, EEO National Plan Summary--Fiscal Year 1975. Agencies which submitted national plans within the deadline were as follows: Defense Investigative Service, Defense Mapping Agency, Environmental Protection Agency, Federal Maritime Agency, General Services Administration, Government Printing Office, Department of the Interior, Interstate Commerce Commission, Department of Labor, National Credit Union Administration, Small Business Administration, Soldiers Home, and U.S. Postal Service. Id.

[310] Id. Agencies which submitted national plans two months or more late were as follows: Council of Economic Advisors; Federal Power Commission; Federal Trade Commission; Department of Health, Education, and Welfare; National Aeronautics and Space Administration; National Foundation on the Arts and Humanities; National Transportation Safety Board; Department of State; and the Department of Transportation. The Commission recognizes that delays are a problem and is taking steps, such as providing advance technical assistance, to encourage agencies to submit plans more promptly. Hampton letter, supra note 7.

[311] EEO National Plan Summary, supra note 309.

[312] Id. Agencies with plans still not approved as of November 8, 1974, were as follows: Department of Defense, Equal Employment Opportunity Commission, Federal Power Commission, Federal Trade Commission, Department of Housing and Urban Development, National Foundation on the Arts and Humanities, National Transportation Safety Board, and the Department of State.

In October 1973, the Commission noted that the most frequently occurring deficiency in agency affirmative action plans was the failure to analyze the agency's EEO status prior to the development of the plan.[314] Thus, the Commission's action plan instructions direct agencies first to make an assessment to identify problems to be corrected in the plan's implementation. The assessment must take into consideration previous evaluations conducted by the agency or the Commission[315] and should include, at a minimum, an analysis of the racial, ethnic, and sex composition of the agency's work force by organizational segment and by major job groupings, as well as an analysis of the availability of persons in the labor market and the number of jobs projected to be filled over the next year.[316]

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[313] These agencies were as follows: Cabinet Committee on Opportunities for Spanish Speaking People, National Mediation Board, Office of Management and Budget, Postal Rate Commission, Railroad Retirement Board, U.S. Commission on Civil Rights, Defense Supply Agency, and Selective Service System. The Commission's regional offices reported in 1973 that regional plans are often submitted late as well. For example, in the Boston Region, during 1972-1973, 41 plans were submitted nearly two months late, and 18 plans were submitted nearly six months late. In the Dallas Region, eight agencies had not submitted plans as of February 1973, which was three months after the due date of December 1, 1972.

[314] FPM Letter 713-22, Oct. 4, 1973.

[315] The Commission requires agencies to conduct on-going self evaluations of their EEO programs. Commission guidelines on agency self evaluations are described on p. 95 *infra*. In addition, the Commission's Bureau of Personnel Management Evaluation periodically conducts general or special reviews concerning an agency's EEO program. These reviews are discussed in more detail in Section VI *infra*.

[316] *Id.* In addition, the assessment is to include a consideration of of the sources and kinds of complaints of discrimination filed against the agency. It should be noted that the Assessment report is not the Commission's only source of information on agency employment statistics and activities. The Commission maintains computer information and also collects data through evaluation reviews, discussed in Section VI *infra*. Hampton letter, *supra* note 7.

The Commission's instructions on conducting an assessment are far inferior to parallel instructions given to Federal contractors for conducting a utilization analysis preparatory to developing an affirmative action plan. Under Executive order regulations, an analysis must consist of a listing of persons employed in each job title, ranked according to pay level, and cross-tabulated by race, ethnicity, and sex.[317] The Commission's instructions are inferior, since they permit agencies to group job titles into major categories, such as professional or technical, clerical and office, and executive and managerial.[318] Such groups can seriously distort the true picture within a work force, since women and minorities could be relegated to only certain jobs within each grouping. The instructions further imply that the analysis of occupational groupings is to be conducted separately from the analysis of organization segments.[319] Since the same occupations may have different grade ranges and advancement opportunities within different organization segments, it is important to analyze the representation in each occupation within each unit.[320]

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[317] 41 C.F.R. § 60-2.11(a), 39 Fed. Reg. 25654 (July 12, 1974).

[318] FPM Letter No. 713-22, Oct. 4, 1973. The Commission notes that further breakdowns of an agency's work force are available through the Commission's data systems. Hampton letter, supra note 7. However, of the 17 affirmative action plans reviewed and discussed on pp. 98-100, infra. not one plan file contained these data nor any indication that Commission staff had referred to such data.

[319] The Commission's instructions read, in part, as follows:

> Such an analysis...should include at least:
> a. Composition of the agency's and subordinate organizations' workforce by racial, ethnic and sex groupings at the various grade levels and in appropriate organizational segments;
> b. Composition (by racial, ethnic and sex groupings and grade level) of major job groupings such as professional or technical, clerical and office, executive and managerial, custodial and service. FPM Letter No. 713-22, Oct. 4, 1973(Appendix II(3).

[320] The Commission's instructions could permit a misleading analysis. For example, minorities or women may be overrepresented in a professional and technical classification in one office or division in which there was opportunity to advance to the GS-9 level, while they may be underrepresented or excluded from the same classification in another unit in which the highest obtainable level is GS-14.

Another deficiency is that agencies are not required to cross-tabulate work force data by race, ethnicity, and sex. The failure to do so may mask the specific problems of a particular group and prevent the development of appropriate numerical goals and action items.

Further, the Commission's instructions fail to explain clearly how availability is to be determined.[321] In 1974, data from the 1970 census on the percentages of women and minorities employed in major professional occupations nationally and by State were distributed to Commission and agency regional offices to be used for determining availability. Other factors, however, such as participation in the work force as a whole, and college and vocational school enrollment, are not listed as factors to be considered.[322] The Commission has prohibited agencies from using population data as a factor in determining availability and has required that the determination be based on "data concerning skills available in the general work force of the recruiting area."[323] However, it has failed to instruct agencies that only valid, job related skills should be considered. Thus, as will be shown below, when agencies attempt to determine availability, it is not uncommon for them to limit the labor pool to persons with college or advanced degrees in specific subject areas without first determining whether such a degree is a prerequisite to successful job performance.

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[321] The Commission's instructions indicate only that the analysis should include "Availability of persons, including minorities and women, having the requisite skills and training in the agency's work-force and in the labor market which the agency uses as its recruiting source...." FPM Letter No. 713-22, Oct. 4, 1973 (Appendix II (3)).

[322] However, the Commission cautioned agencies about using this data alone and encouraged them to consider other factors without indicating which ones.

[323] See, for example, letter from Irving Kator, Assistant Executive Director, CSC., to E.E. Mitchell, Director of Civil Rights, GSA, Nov. 14, 1974. The Commission believes that the only essential difference between its affirmative action requirements and those applicable to Federal contractors pertains to an availability analysis. The Commission does not consider population data to be relevant to the goal setting process. Hampton letter, supra note 7.

The assessment is also to take into consideration previous agency self-evaluations of the EEO program. Executive Order 11478 requires agencies to evaluate periodically the effectiveness with which the policy of the order is being implemented.[324] In February 1974, the Commission issued revised Guidelines for Agency Internal Evaluation of Equal Employment Opportunity Programs.[325] The Guidelines state that the objective of an evaluation is to determine "whether or not an agency is maintaining an affirmative equal employment opportunity program."[326] The evaluation is not to focus exclusively on determining whether discriminatory patterns and practices have been eliminated. Indeed, there are no instructions whatsoever concerning evaluating the impact of affirmative action provisions on the agency's employment profile. The Commission's guidelines on EEO program evaluation presume that the basic ingredients required by the Commission to be included in an affirmative action plan are effective if implemented and, therefore, limit evaluation to determining to what extent the steps have been followed.[327] It is as if a doctor were prescribing aspirin to a cancer patient and periodically evaluating the progress of the patient simply by determining to what extent aspirin doses were being administered.

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[324] Executive Order No. 11478, supra note 41.

[325] Guidelines for Agency Internal Evaluation of Equal Employment Opportunity Programs, Personnel Management Series No. 24, CSC, (February 1974).

[326] Id. at 15.

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[327] The basic questions which agencies are instructed to consider in conducting evaluations include the following:

> Allocation of personnel and resources: Have sufficient resources been assigned and organized to administer and carry out the EEO program in an effective manner? Recruitment activities: To what extent are recruitment efforts reaching all sources of job candidates....? Utilization of skills: To what extent are employees with underutilized skills being systematically identified in the work force and channeled into available job opportunities?....Goals and timetables: Where the affirmative action plan included goals and timetables, to what extent are they: realistic and flexible, accompanied by the necessary affirmative action needed to achieve them, periodically evaluated and updated....? When the affirmative action plan has not included goals and timetables, do problems exist within the organization which indicate a need for them?

Id. at 15-16. The Commission gives no instructions on how to measure the "extent" to which these steps have been taken nor what "extent" is acceptable. The Commission maintains that "results in EEO cannot be measured only in terms of numerical changes in an agency's workforce profile," but that it does expect agencies to report hiring results when such data are available. Hampton letter, supra note 7.

A review of 17 national action plans submitted in Ovember 1973 and May 1974,[328] disclosed that not one of the agencies had conducted a proper work force analysis according to the Commission's instructions.[329]

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[328] The agencies whose nationwide action plans were reviewed by this Commission were as follows: Department of Agriculture (DOA) (submitted Oct. 31, 1973; approved Nov. 14, 1973); Civil Aeronautics Board (CAB) (submitted May 29, 1974; approved July 18, 1974); Civil Service Commission (CSC) (submitted May 2, 1974; approved July 3, 1974); Defense Contract Audit Agency (DCAA) (submitted May 17, 1974; approved June 13, 1974); Equal Employment Opportunity Commission (EEOC) (submitted May 24, 1974, not approved as of Nov. 8, 1974); Farm Credit Administration (FCA) (submitted May 31, 1974 approved Aug. 9, 1974); Federal Deposit Insurance Corporation (FDIC) (submitted May 15, 1974; approved June 24, 1974); Federal Home Loan Bank Board (FHLBB) (submitted May 8, 1974; approved June 7, 1974); Government Accounting Office (GAO) (submitted June 11, 1974; approved July 9, 1974; Department of Housing and Urban Development (HUD) (submitted June 5, 1974; not approved as of Nov. 8, 1974); Department of the Interior (DOI) (submitted May 1, 1974; approved June 25, 1974); Department of Justice (DOJ) (submitted Nov. 20, 1973; approved July 19, 1974); Department of Labor (DOL) (submitted May 1, 1974); approved June 11, 1974); National Foundation on the Arts and Humanities (NFAH) (submitted July 19, 1974; not approved as of Nov. 8, 1974); Office of Management and Budget (OMB) (submitted Oct. 31, 1973; approved Nov. 28, 1973); U.S. Postal Service (USPS) (submitted Apr. 30, 1974; approved July 11, 1974); Smithsonian Institution (SI) (submitted Nov. 1, 1973; approved Mar. 1, 1974).

[329] The Commission, in reviewing this report, indicated that it did not intend to require agencies to submit all of the information listed in the instructions on conducting an assessment. Rather, the Commission stated, the agency must show merely that a proper analysis was conducted. In addition, the Commission indicated that many of its reviews involve requirements for submission of additional data prior to approval of the plan. Hampton letter, *supra* note 7.

Six failed to include an analysis by either organizational segment or by job groupings.[330] Six others included generally simplistic analyses by job grouping and no analyses by organizational segment.[331] The remaining five contained no analysis by job grouping, although they did indicate the percentage of women and minorities within each major office, but not necessarily by grade level.[332] All but three of the assessment reports' analyses failed to cross tabulate data by race, ethnicity, and sex, which resulted in counting minority women twice in the calculation.[333]

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[330] These agencies were FDIC, FHLBB, GAO, DOJ, USPS, and SI.

[331] These agencies were DOA, DCAA, EEOC, NFAH, and CSC. The job grouping analyses consisted generally of an assessment of the total percentage of women and minorities in major occupational series, such as science and engineering or accounting and budgeting, without considering the relative grade levels.

[332] These agencies were CAB, FCA, HUD, DOL, and OMB.

Not only did the reports fail to identify adequately the status of women and minorities within the agency work force, but they also ignored the important step of determining the disparity between that status and what the level should be, based on availability in the work force. Only four of the reports contained even a rudimentary analysis of the availability of persons, including women and minorities, for positions with the agency.[334] These based their estimates solely on the number of persons currently employed in certain occupations or holding college degrees in specific subject areas, without any indication that a college degree or job experience was a valid requirement. Federal contractors, in contrast to Federal agencies, are not permitted to restrict the estimated availability of women and minorities by confining their estimates to the numbers of persons with skills or experience which are not shown to be essential for successful performance of the job.[335]

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[333] The three agencies which did cross tabulate workforce data were EEOC, OMB, and NFAH. GAO indicated that it recognized the importance of cross tabulation and that it would establish separate goals for nonminority women.

[334] The four agencies were CSC, DOA, CAB, and DCAA. The remaining 13 contained no such analysis. The CSC assessment report, which purported to contain a section on availability, stated that there appeared to be "a number" of incumbent minority and female employees at GS-5 and below who were available "for upper staffing needs," and that "there appears (sic) to be considerable numbers of minority and women employees in the workforce to compete for the GS-11 and above positions except for several categories: wage and pay specialists, research pychologists (sic), computer systems analysts, programmers in bureaus and investigators in regions." No specific estimate was given of the availability of women and minorities for any CSC professional positions, however.

In addition, 12 of 17 agency assessment reports ignored the requirement of including projected job openings.[336] Fourteen of the 17 action plans were approved by the Commission, with no reference to the inadequacies in the assessment reports; approval of the remaining three had been withheld as of November 1974 on grounds other than the inadequacies in the assessment reports.[337]

Following the assessment of the EEO profile, the agency is instructed to develop an action plan with an introduction explaining resources and organizations for the program, a report of accomplishments,

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335. 41 C.F.R. § 60-3.

336. These 12 agencies were the DOA, CSC, DCAA, EEOC, FCA, FDIC, GAO, DOI, DOJ, NFAH, USPS, and SI. The Civil Service Commission's assessment report merely stated that "...anticipated hiring will closely proximate that performed last year, allowing for a probable increase in total employment figures."

337. These three agencies were EEOC, HUD, and NFAH. See note 328 *supra*. The Commission maintains that it requires agencies to adhere to its guidelines. However, because it does "not want the preparation and submission of action plans to the CSC to be the principal EEO activity in the agencies," it does not "require the inclusion of a great deal of voluminous information in the plan." It asserts that it has, therefore, "approved plans which met the basic requirements of the law and CSC guidance, while continuing to bring to the attention of agencies aspects of their plans which should be strengthened to more fully address particular EEO problems." Hampton letter, *supra* note 7.

and a report of specific actions to be taken during the plan year.[338] National plans should include descriptions of programs pertaining to headquarters and installations nationwide, as well as a summary of regional programs. Regional plans are to cover programs which are locally administered.[339]

The introduction must describe the responsibilities of the EEO program staff, the number of full and part-time persons assigned to EEO responsibilities, and the training provided to these persons.[340] The Commission recommends that agencies provide at least one complaint counselor in each installation with 50 or more employees and that at least one counselor be appointed for every 500 employees.[341] It has not, however, established any recommended guideline on full-time EEO staffing. As a result, the agencies' allocations of full-time staff to EEO vary widely.[342]

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338. FPM Letter No. 713-22, Oct. 4, 1973 (Appendix II).

339. Id.

340. Id. In addition, the introduction must include a certification by the appropriate agency representative that the principal EEO officials meet the qualification standards set forth by the Commission in Handbook X-118 under "Equal Opportunity Specialist GS-160" or "Qualifications Guide for Collateral Assignments Involving Equal Employment Opportunity Duties." Id.

341. Id.

342. For example, for 10 agencies the ratio of full-time EEO staff to agency employees was as follows: DOA, 1: 2,317 (33 full-time EEO staff; 78,450 employees); CAB, 1: 213 (3 full-time EEO staff; 694 employees); CSC, 1: 2,000 (three full-time EEO staff; 6,000 employees; FDIC, no full-time EEO staff (2,657 employees); FHLBB, 1: 1,243 (1 full-time EEO staff, 1,243 employees); GAO, 1: 1,274 (4 full-time EEO staff; 5,078); DOJ, 1: 1,655 (29 full-time EEO staff; 48,000 employees); DOL, 1: 381 (33 full-time EEO staff; 12,585 employees); USPS, 1: 2,347 (303 full-time EEO staff; 711,192 employees); SI, 1:540 (5 full-time EEO staff; 2,700 employees).

The agency's accomplishment report must indicate which actions in the previous plan were carried out, which actions were not accomplished and the reasons for the failure, the results of all actions, as well as "progress in reaching program objectives, the number of target positions actually filled, and the number of persons trained."[343] The major deficiency in this instruction is its failure to require that agencies report on accomplishments in terms of the numbers of minorities and women affected by each facet of the affirmative action plan as well as the numerical changes in overall minority and female employment. The Commission has not developed a reporting device which requires that agencies present data on the number of women and minorities participating in upward mobility and training programs, the number recruited, and the number to whom job offers are made, as well as the number hired and promoted, by grade level, as a proportion of the total number of persons hired, promoted, recruited, trained, or offered jobs.[344]

Because the Commission has not required adequate reporting, agencies generally fail to report on the numbers of minorities and women receiving the benefits of special programs or on the impact of previous plan actions on minority and female employment. For example, agencies frequently report on the total number of persons who received training during the plan year without indicating the racial, ethnic, and sex composition of the trainees.[345] It is not uncommon that an agency reports as an "accomplishment" the fact that it recruited at a certain number of minority colleges, without reporting on the number of hires made as a result of the recruiting effort.[346] At least three of the seventeen progress reports reviewed contained no information concerning the change in the status of minority or female employment.[347]

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[343] FPM Letter No. 713-22, Oct. 4, 1973 (Appendix II). "Target Positions" refers specifically to the positions in which upward mobility participants have been placed. Id.

[344] The Commission does not believe collection of such information through the accomplishment report would serve a useful purpose since it is currently completing the development of a Central Personnel Data File (CPDF) computer system which will show data on hires, promotions, separations, and training by sex and minority group. Hampton letter, supra note 7.

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[345] For example, DOA reported only that 226 employees had received career counseling, 23 received General Educational Development (GED) training, and 44 employees were involved in training to prepare them for professional, administrative, or technical positions. Similarly, HUD reported only 1,200 employees had received training. OMB stated that "staff attended 220 courses over the past year." DOL did not indicate the race, ethnicity, or sex of the 32 worker trainee participants it had sponsored during the plan year. When agencies did include racial, ethnic, and sex data on trainees, there appeared to be a disparity between training received by minorities and women and that receivied by nonminority males. For example, although women make up 40 percent of the workforce at CAB, they were only 18 percent of employees receiving management, administrative, and supervisory training. Of the 25 participants in DOL's upward mobility program, 18 were nonminority males.

[346] For example, DOJ's accomplishment report indicated only that "Bureau efforts to recruit minorities continue. A variety of special efforts were made during 1973." The DOL reported only that it had made 25 campus recruitment visits. The Smithsonian reported that over 200 organizations and colleges having minority and female enrollment received recruitment announcements and that four minority schools were visited. As another example, the CAB reported that 10 supervisors were hired or promoted, without specifying the racial, ethnic, or sex identity of the individuals. The only plan of the 17 reviewed which the Commission criticized for not having reported results of the actions taken was that of EEOC. Letter from Alfred P. Squerrini, Acting Director, Office of Federal Equal Employment Opportunity, CSC, to Harold S. Fleming, Acting Director, Equal Employment Opportunity, EEOC, July 19, 1974. The Commission maintains that collection of quantitative data on the results of recruitment data would not be a wise expenditure of resources because of the difficulties involved in tracking candidates through the system. Hampton letter, supra note 7.

If quantitative results were described, they were generally presented in such a way as not to be subject to meaningful evaluation. Many of the agencies reported on the net percentage increases in total minority and female employment, which are not meaningful data from the standpoint of affirmative action, since they do not show the total opportunities

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[347] These were the reports contained in the affirmative action plans of OMB, HUD, and DOI. DOI claimed that it was making "slow progress" in increasing minority employment. However, the total black employment in 1974 (3.4 percent according to the Department's data presented in the plan assessment report) was one and a half percent lower than the percentage in 1969 (4.9 percent) according to a study prepared by the Civil Service Commission in 1969 and more than one percent lower than that in 1972 (4.5 percent). Minority Group Employment (1973), supra note 61, In fact, there has been a steady decline in black employment at DOI. The Commission maintains that it monitors:

> all facets of Federal agency implementation of the equal employment opportunity program continuously through statistical analysis, review of action plans and on-site evaluations. Agency headquarters also monitor the progress of lower echelons, for example, those which may have set goals and timetables. We certainly expect a "good faith" effort on the part of agencies and our follow-up of their performance which includes a review of accomplishment reports which we require them to submit is for the purpose of making just such a determination. Hampton letter, supra note 7.

for hiring and promoting.[348] When data were presented on minority and female promotions, they were sometimes given only in absolute numbers.[349] However, some agencies did present data on the percentages of new hires and promotions which went to minorities and women, but they failed to indicate to what grades, occupations, and organizational segments these persons were hired or promoted.[350]

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[348] For example, an agency's minority employment might have increased from six to seven percent, when the agency actually had enough job openings to have hired a sufficient number to have increased minority employment to 10 percent. One agency, DCAA, reported that its minority employment had increased by .9 percent over the plan year, largely due to decreases in total anglo employment as a result of a reduction in force; however, the percentage of minorities hired during the plan year had actually fallen to such a low rate that, if continued, would result in decreases in total minority employment.

[349] For example, the CAB merely reported that 40 women were promoted, and the FCA noted that the total number of minority employees increased from 23 to 29. DOL's progress report on changes in minority and female employment consisted of a statement that three women had been appointed to advisory committees, two Spanish surnamed Americans were hired in one region, and two Spanish Surnamed Americans were recruited but not hired in another region. DOI simply reported that 45 accession and promotion actions had been made of women in Grades 13-15, for a net increase of 25 women in those grades, and that 183 women were promoted or appointed to Grades 11 or 12. FDIC indicated that 25 women had been recruited as bank examiners.

[350] Reports which exhibited this deficiency included those of USPS, GAO, and DOA.

The final section of an agency affirmative action plan should be the "Report of Specific Actions for the Coming Year." The Commission has instructed agencies that action items are to be specific, annual objectives, based on "identified problem areas or impediments to equal employment opportunity...."[351] Action items must cover eight topics: (1) organization and resources for the EEO program;[352] (2) recruitment;[353] (3) "Full Utilization of the Present Skills of Employees;"[354] (4) upward mobility;[355]

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351. FPM Letter No. 713-22, Oct. 4, 1973 (Appendix I).

352. The agency is to assure that there is adequate staffing to carry out the affirmative action program and to handle complaints expeditiously and properly. Staffing should be sufficient so that complaints are fully processed within 180 days. FPM Letter No. 713-22, Oct. 4, 1973 (Appendix II).

353. The agency is encouraged to establish recruiting programs designed to reach all segments of the population, including minority groups. In addition to establishing contacts with educational institutions, the agency is to monitor its recruitment efforts, possibly design special recruitment literature, develop cooperative education programs for students, and publicize any part-time employment opportunities. Id.

354. Actions which are suggested by the Commission are the following: (1) survey "underutilized or nonutilized skills available in the existing workforce." (2) review qualification requirements to determine that "...they are not unrealistically high in terms of jobs to be done and that they do not screen out lower-level employees actually capable of performing the real functions of the jobs." (3) establish skills banks of underutilized employees; (4) establish entry level and trainee jobs and restructure jobs "to facilitate movements among occupational areas and enable employees to utilize skills they already have." Id.

355. The Commission has issued a number of instructions concerning the development of upward mobility programs, which are designed to improve the opportunities of employees in lower grades, through training and the creation of trainee positions, to advance to higher grades. See FPM Letter No. 713-27, June 28, 1974. Programs must be open to all employees, not just those from underutilized groups.

(5) training and evaluation of supervisors;[356] (6) agency participation in the community;[357] (7) internal evaluation of the program;[358] and (8) special programs for the economically or educationally disadvantaged.[359] For each action item, the agency is to report the agency official responsible for implementation and a target date for completion. .

Action items also must be included concerning specific emphasis programs for improving employment opportunities for two groups, Spanish-

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356. It is suggested that agencies include the subject of EEO in supervisory and managerial training courses. In addition, supervisors' performance in EEO is to be evaluated and recognized through award programs. FPM Letter No. 713-22, Oct. 4, 1973 (Appendix II).

357. Agencies are encouraged to participate in community programs to facilitate housing, transportation, and childcare needs of Federal employees, as well as to establish relationships with minority and women's organizations and with educational institutions. Id.

358. Agencies' responsibilities for on-going evaluation of EEO programs are discussed on p. 95 supra. In the action item section of the plan, agencies are to indicate what steps will be taken during the year to facilitate this evaluation.

359. Agencies must include in the action plan a copy of their Worker-Trainee Opportunities (W-TO) plan, which must provide a system for recruiting, counseling, training, and developing careers for low-skilled persons. CSC Bulletin No. 713-31, Apr. 27, 1973; W-TO operations manual, September 1973, (revised May 1974).

speaking Americans[360] and women.[361] All agencies are required to designate employees to coordinate these programs, either on a full- or part-time basis, depending on the size of the agency.[362] The primary function of the Spanish Speaking Program Coordinator is to assure that the agency's recruitment is reaching Spanish speaking Americans.[363] The Federal Women's Program Coordinator is to focus on improving the employment status of women already in the agency's work force.[364] Both special emphasis program coordinators are to assist

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360. In 1970, the Civil Service Commission began to undertake a Sixteen Point Program to improve employment opportunities for Spanish speaking citizens. The sixteen steps, set forth in a Presidential directive, included the appointment of an advisor in the Commission to assist in carrying out the program, collection of data on the employment status of Spanish speaking employees, improved recruitment efforts, and emphasis on selecting Spanish speaking candidates for positions "dealing with the Spanish surnamed population." White House Press Release, Nov. 5, 1970. Reproduced in Attachment I, FPM Letter No. 713-18, Jan. 23, 1973.

361. The special program on women, resulting from the issuance in 1967 of Executive Order No. 11375, was separate from the Government's equal employment opportunity program until 1970. Following the issuance of Executive Order No. 11478, which afforded protections to both minority persons and women, agencies were directed to place the Federal Women's Program under the EEO Director. FPM Letter No. 713-15 Feb. 27, 1970.

362. Agencies with more than 7,500 employees are required to appoint a Federal Women's Program Coordinator on a full-time basis. CSC Bulletin No. 171-405 (Oct. 30, 1973). The Commission has not given a minimum standard for agencies concerning the appointment of full-time Spanish Speaking Program Coordinators. The Commission has merely stated that "Where the circumstances do not call for full-time coordinators, appointment of part-time coordinators is called for." FPM Letter No. 713-23 (Apr. 5, 1974).

363. Spanish Speaking Program: A Guidebook for Coordinators, CSC, July 31, 1974.

364. Guidelines for Federal Women's Program Coordinators, FPM Letter No. 171-405, Oct. 30, 1973.

the agency EEO Director in the development of the affirmative action plan. Commission guidelines make clear, however, that neither type of coordinator is to have any authority beyond that of a purely advisory nature.[365]

Agencies are not instructed to describe action items in quantitative terms. For example, in the area of recruitment, instead of recommending that agencies expand their pool of applicants to a specified number, the Commission suggests that an appropriate action item would be to "make certain that recruiting efforts reach all segments of the society, including Black, Spanish speaking, and

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365. Spanish Speaking Program: A Guidebook for Coordinators, supra note 363; and Guidelines for Federal Women's Program Coordinators, supra note 364. The Commission believes that it would be administratively impossible to provide the coordinator positions with line authority. Hampton letter, supra note 7.

other minority groups."[366] As a result, most agencies' action items are generally statements of broad policy objectives, not susceptible of intelligent evaluation. The CAB, for example, had seven action items under the heading of recruitment, which included the following:

> 1. Ensure recruitment efforts are reaching the vast majority of minority and womens' groups in schools, colleges, organizations, and communities by reviewing, updating, advertising, promoting and evaluating the agency hiring policies.... 3. Establish continuous recruiting efforts within all multi-racial and multilingual sections of the community by personal contact and advertising the agency's hiring policy.... 7. Develop part-time opportunities directed toward hiring housewives, minority students, and the physically handicapped. Consideration also will be given to the hiring of the elderly. [367]

At a minimum, adequate action items should have included the following: (1) a specific minimum number of recruitment contacts at named institutions which have been identified as having sufficient minority and female enrollment; (2) a goal of obtaining an applicant pool with a minimum percentage of minority and female applicants; (3) a goal of making job offers to and hiring a minimum percentage of minority and female applicants; (4) the development of a reporting system by which to monitor recruiting officers and the effects of the entire recruitment effort on an on-going basis; and (5) the establishment of a certain number of part-time positions in specific job categories.[368]

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366. FPM Letter No. 713-22, Oct. 4, 1973 (Appendix II).

367. CAB Affirmative Action Plan, supra note 328. As another example, the Civil Service Commission set as an action item, with a target date of December 31, 1974, to "Motivate and encourage well qualified individuals outside current workforce to apply for eligibility on FSEE, MI, and Mid-Level examinations. As vacancies within CSC are filled, these and other well qualified persons within reach on appropriate registers will be considered for employment."

368. The Commission maintains that such specificity in many cases is contained in local plans. Hampton letter, supra note 7.

Since the Commission does not require that agencies include as an action item the setting of goals for improved changes in the employment status of minorities and women, relatively few agencies include numerical goals and timetables in their affirmative action plans. Of the 17 national plans reviewed, only four contained numerical objectives.[369] When agencies did include quantitative goals and timetables, the objectives were improperly developed.

The Commission's instructions on the development of goals[370] are entirely inadequate and clearly inferior to guidelines applicable to Federal contractors.[371] Instructions to Federal contractors explain that goals are ultimate objectives for eliminating disparities between the percentage of women and minorities in the employer's work force and the percentage in the work force as a whole; goals are to be met by establishing adequate annual hiring and promotion objectives, which are percentages of the total number of job opportunities. The Department of Labor has further specified that annual objectives, in percentage terms, must be greater than the work force availability, in percentage terms; otherwise, the ultimate objective would never be obtained.[372]

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[369] These agencies were DOA, DOI, EEOC, and GAO. Five agencies indicated that they intended to set goals in the future. These were DOJ, HUD, DOL, DCAA, and OMB. The Commission's regional offices reported in 1973 that few regional agency installations include numerical goals and timetables in their plans. Of 147 plans submitted in the Dallas region, only 29 included numerical objectives. Similarly, three of 71 plans in the Denver region, five of 91 in the New York region, 19 of 124 in the Philadelphia region, 31 in the St. Louis Region, none of 134 in the San Francisco Region, and three of 69 plans in the Seattle region contained numerical goals and timetables. Thus, of 710 plans, 90 or approximately 12 percent, contained quantitative goals and timetables. The Commission asserts that most agencies adopt goals where appropriate. Hampton letter, supra note 7.

[370] FPM Letter No. 713-22, Oct. 4, 1973.

[371] 41 C.F.R. §§ 602; 60.9 (XII).

The Commission has failed to make the distinction between ultimate goals and interim objectives, and it has failed to instruct agencies to consider basic mathematical realities. As a consequence, agencies which do include "goals" in their affirmative action plans generally present what are, in effect, hiring objectives that even if followed would never enable the agency to reach a level of female or minority employment equivalent to the percentage which the agency has determined is available in the work force.[373] At least one agency established a hiring objective

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372. Id. For example, if women make up 35 percent of all professional biologists, an agency having a biology staff with no females would have to establish an objective of filling with women more than 35 percent of all biology job openings if it is ever to eliminate the disparity.

373. For example, DOA determined that in 1970-71, women made up 15.5 percent and minorities 3 percent of all college graduates in the agriculture fields (biology, botany, bacteriology, microbiology, biochemistry, accounting, general engineering, agriculture engineering, civil engineering, veterinary medicine, chemistry, geology, and economic). It, therefore, established a "goal" of filling 15.5 percent of all professional openings with women and 3 percent with minorities during 1974. If these hiring objectives were followed annually, the Department of Agriculture would never reach a level of female and minority employment equivalent to the percentages of these persons available in 1970-71.

which led to a decrease in the percentage of the class whose employment status the agency had intended to improve.[374] The same agency established an objective for the subsequent plan year which was less than the percentage actually hired the previous year.[375] A second deficiency in the Commission's instructions on goals and timetables is their failure to state that agencies should consider only valid, job-related skills when determining the availability of minorities and women, or what the ultimate goal should be.[376]

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[374] GAO set a goal in its 1974 action plan that 10 percent of all persons hired would be white women, although the percentage of white women employed at the agency at the beginning of the plan year was 15.1 percent. The percentage of white women at the agency by the end of the plan year had fallen by .1 percent; the decrease would have been even greater if the hiring objective had been followed. In practice, however, the agency's new hires were 14.9 percent white women. The Commission did not consider the agency's goal to be inappropriate, indicating that "there is no reason why this goal must be directly related to any predetermined proportion of minorities or women expected to be represented in the agency's workforce at some future point." Hampton letter, supra note 7.

[375] GAO's hiring objective for white women in professional jobs during 1975 was stated to be 13 percent. In 1974, 14 percent of professional new hires at the agency were white women.

[376] The Commission believes its instructions on goals are clear since they distinguish goals from quotas and do not include a reference to general population data. Hampton letter, supra note 7.

In sum, the Commission has failed to require agencies to follow its own guidelines on identifying problems to be addressed in affirmative action plans. Even if the guidelines were followed, however, a thorough analysis of the problem of underutilization would not be obtained. Further, the Commission allows agencies to claim progress, although the data presented do not indicate that such a conclusion can be drawn. Finally, agencies are permitted to establish vague "action items" which ultimately may have no impact on the status of women and minorities in Federal employment.[377]

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[377] The Commission believes that agency affirmative action plans have "been successful in bringing about increased agency concern and action in the area of EEO" and that "increases in the employment, promotion, and training opportunities for women and minorities can be attributed to a large degree to the implementation of affirmative action plans in Federal agencies." The Commission supports this view by citing recent statistics which "show a continuing increase of women and minorities in professional, technical and administrative jobs at the higher grade levels." In addition, the Commission is of the opinion that this report suffers from a bias which places too much emphasis on statistical analysis:

> Comments throughout this section of the Civil Rights Commission's draft report suggest that CRC believes the action plan process should be a mechanistic one concerned mainly with statistical analysis and the setting of goals. The yardstick against which the plan's contents would then be measured is presumably to be derived from the narrowly defined concept of "representative bureaucracy" described in the introduction to the draft report--a definition we have also indicated we reject. Hampton letter, supra note 7.

VI. Evaluating Agencies' Compliance

The Office of Federal Equal Employment Opportunity (FEEO) within the Commission is responsible for reviewing and approving agency affirmative action plans. This office does not conduct independent reviews of the agencies' personnel systems to determine whether they are adhering to nondiscriminatory practices and to their affirmative action plans, or whether the plans are adequate in relation to objectively determined affirmative action needs. Instead, this review function is assigned to the Commission's Bureau of Personnel Management Evaluation (BPME) and Personnel Management Evaluation Divisions within the regional offices, which are responsible for evaluating agencies' compliance with all Commission regulations.

The Bureau's headquarters and regional staffs conduct periodic onsite reviews of agency personnel practices and programs to investigate recruiting, hiring, job classification, and merit promotion practices, as well as to survey employee attitudes.[378] In addition to these general reviews, which require approximately 54 person days,[379] the Bureau conducts special inquiries focusing on specific areas of personnel management, such as labor relations or equal employment opportunity. Most special reviews, which require approximately 16 person days,[380] are devoted to investigating equal employment opportunity.[381] Reviews are made of specific agency facilities, which, in turn, form the basis for general reports on the agency nationwide.

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[378] Interivew Frank Kelso, Assistant Director for Evaluation Systems, BPME, CSC, Nov. 7, 1974.

[379] A general review requires, on the average, 434 person hours and costs $6,320. Interview with Paul Wright, Chief, Planning and Review Section, BPME, CSC, Nov. 19, 1974.

[380] Special reviews average 142 person hours and cost approximately $2,220. Id.

Altogether, there are an estimated 4,000 Federal agency installations which fall within the Bureau's responsibility to review.[382] The total full-time staff allocated to the Bureau and the regional divisions numbers 245.[383] During fiscal year 1974, the Commission's evaluation program was allocated $5.4 million, which was the same amount projected to be allocated for fiscal year 1975 operations.[384] With such limited resources, the Bureau and its regional offices are not able to review a significant portion of the total facilities for which they are responsible in a given year. During fiscal year 1974, the Bureau conducated only 339 general reviews and 282 special reviews.[385] The Bureau projected a workload during fiscal year 1975 of 243 general reviews and 246 special reviews.[386] It appears, therefore, that less than 15 percent of Government installations are subject to the Commission's evaluation reviews per year.[387]

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[381] Kelso interview, *supra* note 378.

[382] Hampton letter, *supra* note 7.

[383] Central Personnel Data File Report, CSC, May 31, 1974 (Tables E and Q).

[384] CSC Operations Letter No. 273-763, Mar. 28, 1974. The Commission's evaluation program is thus provided with approximately 20 percent of the resources which are allocated to the Federal contract compliance program, which has fewer facilities to review (325,000) but with approximately 10 times the number of employees (30 million). The fiscal year 1974 allocation to contract compliance programs was $31 million. See OFCC report, Chapter III *infra*. Federal civilian employment was approximately 3 million at the end of 197[illegible] See note 1 *supra*.

The Commission's evaluation reviews are planned according to a survey schedule drawn up by the regional offices and approved by the Bureau. The Personnel Management Evaluation Division (PMED) in each region selects certain agency installations for review based on four criteria, one of which is the existence of personnel management problems adversely affecting the "attainment of public policy goals."[388] Equal employment opportunity is included in this category.[389]

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[385] Telephone interview with Paul Wright, Chief, Planning and Review Section, BPME, CSC, Dec. 2, 1974.

[386] These figures were compiled from reports submitted to Bureau headquarters from regional offices in September 1974. See, for example, Memorandum from Charles A. Maher, Regional Director, Region I (Boston), to John D. R. Cole, Director, BPME, Sept. 18, 1974. A special EEO task force was established to review the performance of agencies in the metropolitan Washington, D.C. area. Hampton letter, supra note 7.

[387] This figure is based on the assumption that the Bureau conducts approximately 500-600 total reviews per year of the estimated 4,000 Federal agency installations.

Both special and general reviews commence with a notification to the agency and a request for certain information, which are followed by an onsite evaluation of the installation and the preparation of a final report. The initial request for information is made by written questionnaire forms designed to cover general personnel management[390] and specific areas, such as merit promotion, EEO, employee development, and performance ratings.[391] The EEO questionnaire requests a copy of the agency's affirmative action plan,[392] a listing of recruiting contacts, a description of the internal EEO evaluation system, a summary of formal complaints filed, and copies of any analyses made by the agency of training and advancement opportunities for women and minorities.[393]

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388. CSC Operations Letter No. 273-763, supra note 384, Attachment.

389. Wright interview, supra note 385. The other three criteria pertain to merit system integrity, internal evaluation systems, and management problems adversely affecting the operating goals of the agency. CSC Operations Letter No. 273-763, supra note 384.

390. The general questionnaire form requests such information as a listing of positions indicating official titles, series, and grade; an organization chart; significant internal personnel management reports; average General Schedule grade of employees and the ratio of supervisors to non-supervisors; and the number of worker trainees, career-conditional or career appointments, promotions, transfers, reassignments, demotions, suspensions, and hires. The only question contained in the general questionnaire which pertains to EEO requests a description of the length of time the EEO officer has held his or her position. CSC Form 924 (January 1972).

391. CSC Forms 929, 931, 1123, and 930 (January 1972).

392. The Commission maintains that action plans have received "increased scrutiny in terms of relevance and accomplishment" since 1972. Hampton letter, supra note 7.

393. CSC Form 931 (January 1972).

In addition, the questionnaire requests the agency to submit available statistical data showing the proportion of women and minorities in each grade and general occupational code, and in supervisory and nonsupervisory positions. While the statistical format requested in the evaluation questionnaire suffers from some of the same deficiencies found in the affirmative action plan assessment report,[394] it is superior in that it requests the agency to provide statistics showing the proportions of women and minorities hired or promoted, although not by grade levels or occupational series.[395]

Besides collecting basic information through the evaluation questionnaire, the Commission sometimes conducts a survey of employee attitudes prior to conducting the onsite review.[396] As of December 1974, there were two types of employee surveys utilized, one pertaining to general personnel practices[397] and another pertaining specifically to equal employment.[398] Employee responses are tabulated according to race, ethnicity, and sex only in reporting the results of the EEO survey.[399] The results compiled as of May 1974, based on surveys conducted at 35 agency installations, showed that generally minority and female Federal employees are less satisfied with opportunities for promotion and with their jobs than are nonminority males and that they more frequently perceive that women and minorities are treated unfairly than do nonminority males.[400] The employee survey on EEO appears to have been conducted in appromximately 14 percent of all general and special reviews.[401]

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[394] For example, the form fails to require that data be cross-tabulated by race, ethnicity, and sex, which can result in counting minority females twice.

[395] CSC Form 931 (January 1972). The form requests the agency only to give the total number of employees, minority employees, and female employees hired, promoted, and promoted to supervisory positions in General Schedule and Wage Grade categories. BPME evaluates statistics to determine if they show a prima facie violation of Title VII. BPME also considers such factors as the number of persons "qualified" for the positions and the number applying. Hampton letter, supra note 7.

[396] For a brief description of the Commission's use of employee attitudinal surveys, see M. Gannon, The Proper Use of the Questionnaire Survey, Business Horizons, October 1973.

[397] CSC Form 1088 (June 1971). Summary results from these surveys are reported to Commission evaluators on a periodic basis to permit them to make normative comparisons. See CSC Operations Letter No. 27?-708 (May 11, 1973).

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[398] CSC Form 1165 (May 1973). Summary data from this survey questionnaire were reported in CSC Operations Letter No. 273-769 (May 21, 1974).

[399] Commission staff indicated that minority and sex identification of respondents will be incorporated into the general survey form within the next year. Interview with Martin Berman and Charles Kopchik, Personnel Management Specialists, BPME, CSC, Nov. 13, 1974.

[400] Survey results showed that 50 percent of males, 51 percent of nonminorities, 56 percent of females and 57 percent of minorities were not satisfied with opportunities for promotion. Dissatisfaction with job was indicated by 18 percent of males, 18 percent of nonminorities, 23 percent of females, and 31 percent of minorities. When asked whether they felt minority employees were treated better, the same as, or worse than nonminority employees, 2 percent of males, 3 percent of nonminorities, 8 percent of females, and 21 percent of minorities responded "worse." Four percent of males, 9 percent of nonminorities, 13 percent of minorities, and 19 percent of females responded that females were treated worse than males. CSC Operations Letter No. 273-769 (May 21, 1974). The Commission did not cross-tabulate by race and sex the data on survey responses.

[401] Commission logs indicate that from September 1973 to September 1974 the questionnaire was administered 90 times. During a comparable period of time, fiscal year 1974, a total of 621 reviews were conducted. Assuming that approximately the same number of reviews were conducted from September 1973 to September 1974, 14 percent (90) of these reviews included the EEO survey of employees; approximately 31 percent of the 282 Special EEO reviews included use of the survey.

After the preliminary information has been analyzed, the Commission's team of evaluators, or "advisors"[402] makes an onsite review of the agency. If the review is of general nature, the advisors inspect the agency's personnel files and interview both management and employees in order to investigate the agency's practices affecting employee development, or training,[403] as well as position classifications and staffing.

The Commission is required by law[404] to review the positions in each agency to determine whether each job held by an incumbent is classified and graded according to Commission regulations.[405] The evaluation team reviews a sample of positions, the number of which depends on the size of the agency. For each position, the team audits the position description and interviews the incumbent employee and supervisor to determine if the incumbent is performing the duties described in the position description and whether the duties are consistent with the position classification and grade.[406]

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[402] Although evaluation reviews are directed at determining compliance with Commission regulations and Commission staff has the authority to order changes in an agency's practices if violations are found, the Commission refers to its investigators on evaluation teams as "advisors." See, for example, FPM Letter (Int.) No. 273-22 (May 28, 1974) Attachment.

[403] For example, Commission advisors determine whether the agency has conducted an annual review of employee training needs, required by 5 C.F.R. § 410.201; whether it has adhered to statutory restrictions concerning training through non-Government facilities, 5 U.S.C. § 410.502(b); and whether all training provided was related to the performance of official duties, as required by 5 U.S.C. § 4101. FPM Letter (Int.) No. 273-22 (May 28, 1974) Attachment.

[404] 5 U.S.C.5110.

[405] The classification and grade systems are brieftly described in note 43 supra.

The evaluation of staffing is designed to determine whether the agency's recruitment, selection, and placement activities conform to Commission regulations, merit principles, and statutory requirements. The evaluation is conducted by reviewing a sampling of personnel actions for possible violations and irregularities, such as the passing over of veterans or candidates rated as better qualified. Attention is also to be given to patterns in placements and appointments to determine if the agency is filling positions at unnecessarily high levels or if it has limited its recruitment to sources unlikely to produce minority candidates.[407] Other than the foregoing, there are no references in these guidelines on classification and staffing instructing advisors to review for patterns or practices having a disparate or discriminatory effect on minorities or women.[408]

Special guidelines were issued in March 1974 concerning the conduct of a special equal employment review of an agency's practices and affirmative action program.[409] These guidelines outline the enforcement role of the Commission, the types of discrimination which should be detected, and the remedies available to correct

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406. CSC Operations Letter No. 273-702, May 1, 1973, Attachment I.

407. Id. (Attachment II). There are no similar instructions regarding recruitment of women.

408. For example, there are no instructions concerning reviewing the ratings of candidates to determine if candidates with academic qualifications from predominantly black schools are given lower ratings. The Commission notes that the examples in the guidelines are not intended to be all-inclusive. Hampton letter, supra note 7.

409. FPM Supp. (Int.) 273-73 (March 1974). The Commission issued preliminary guidelines in December 1972 , CSC Operations Memo 273-61, which were revised in September 1973. CSC operations letters No. 273-730, prior to final adoption in 1974. Hampton letter, supra note 7.

the results of discrimination. While there are a number of deficiencies in the guidelines, they appear to be the first operating materials which include a recognition that the discrimination which the Commission is required to eliminate is not only disparate treatment but also practices which have a disparate impact on minorities and women. The guidelines state that:

> Discrimination, in the context of Public Law 92-261 /1972 Amendments to Title VII/ refers to any act, policy, or decision which makes, or has the effect of creating or resulting in, a distinction among or different treatment between, persons or groups on the basis of race, color, religion, national origin or sex.... Compliance and corrective action need not be based solely on unlawful employment practices that result from intent to discriminate but may be aimed at the discriminatory effects of institutional practices upon minorities and women as a group. [410]

According to the guidelines, practices and policies which have an "exclusionary" effect may require a finding of discrimination unless the agency meets its burden "...of showing that in fact there was no discrimination."[411] However, the guidelines do not explain what type of evidence would meet this burden of proof. They do not specify whether the agency must come forward with evidence that the practices were adopted without intent to discriminate--which is immaterial in a Title VII context,[412] or whether it must show that the practices are required by some compelling, nondiscriminatory purpose.[413]

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[410] Id. at 64 and 66.

[411] Id. at 77.

[412] In Griggs v. Duke Power Co., supra note 114, at 432, the Supreme Court stated that "/G/ood intent or absence of discriminatory intent does not redeem employment procedures....Congress directed the thrust of the Act to the consequences of employment practices, not simply motivation." Recently, the Commission indicated that it fully subscribes to this view. Hampton letter, supra note 7.

[413] This provision means that the agency must show that the practice is consistent with Commission instructions on employee selection standards. See Section III of this report supra.

The guidelines include examples of neutral practices which may have a discriminatory effect, such as a practice of not hiring below the journey-person level where such policy excludes minorities and has "no rational basis,"[414] or of requiring occupational skills that are not necessary for successful job performance.[415] The guidelines indicate that sex discrimination is more likely than race or national origin discrimination to be overt and is manifested in placement and recruitment patterns resulting from conclusions about women based on sexist stereotypes.[416]

Thus, although the Commission officially defines discrimination as disparate treatment and follows that view in the context of the regular complaints procedures and adjudications by the Appeals Review Board, the EEO evaluation review guidelines appear to contain an expanded definition including practices having a disparate impact and which cannot be explained in some way by the agency. However, as will be discussed below, evaluation reports show that this view of discrimination does not prevail in the actual conduct of reviews.[417]

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[414] FMP Supp. (Int.) No. 273-73 (March 1974) at 64. The inadequacy of the Commission's standards for validating such practices is discussed in Section III of this report, supra.

[415] Id.

[416] Id. at 65. The examples included in the guidelines pertaining to sex discrimination are exclusively devoted to listing sexist stereotypes, for example "Men are more adaptable to all work assignments....Men can work longer hours, Men do better than women at jobs requiring climbing, lifting, or standing." While the examples are helpful, the guidelines on sex discrimination should be expanded to include examples of apparently neutral practices which have a disparate effect on women, such as mechanical ability tests or ratings practices which award lower scores to candidates with academic backgrounds in fields in which women predominate, unless such rating is predictive of job performance. In addition, the guidelines should include examples of sexist stereotypes which adversely affect the job opportunities of men, for example, stereotypes about male clerical workers.

[417] See discussion on pp. 130-37 infra.

When an individual is found to have been discriminated against, the evaluator is to advise the employee to initiate the complaint process.[418] Nevertheless, the guidelines include examples of corrective action that may be ordered when special evaluation reviews find that individual applicants or employees were denied employment or promotion due to discrimination.[419] When patterns or practices are identified which adversely affect identifiable groups, corrective action may include back pay, retroactive promotion, or priority consideration for those individuals adversely affected.[420]

The guidelines, however, do not require systematic investigation to identify employment practices which may have an illegally discriminatory effect. Under Title VII, a statistical disparity in the representation of minorities or women in any occupational series, organizational unit, or pay level would generally constitute a *prima facie* violation of the law, requiring the employer to come forward with evidence identifying and demonstrating a

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418. *Id*. at 66, note 1.

419. *Id*. at 67. The guidelines limit the granting of retroactive relief to those persons who would have received employment or promotion but for the discrimination. The restrictive nature of this interpretation of the Commission's authority to order retroactive relief is discussed on p. 84 *supra*.

420. *Id*. at 68.

compelling purpose for the employment practices causing the disparity.[421] The Commission's guidelines do not require any investigation upon a finding of underutilization or exclusion. Instead, they merely suggest that the exclusion of minorities or women from certain grades or occupations permits the evaluator to investigate the causes for the exclusion. If such an investigation is undertaken, it is to be limited to reviewing past personnel actions to determine if members of the excluded groups have been consistently rated as "best qualified,"[422] but nevertheless passed over in promotions.[423] Although the absence of minorities or women from "best qualified" lists may also be indicative of illegal discrimination, the guidelines fail to suggest that the evaluator investigate the validity of the ratings standard or its application in such personnel actions.[424]

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421. See e.g., Boston Chapter, NAACP Inc. v. Beecher, supra note 121; Spurlock v. United Airlines Inc., 475 F.2d 216 (10th Cir. 1972); and Parham v. Southwestern Bell Telephone Co., supra note 267.

422. The Commission's instructions to agencies on evaluating candidates for promotion and internal placement require that the agency determine the "best qualified" among the candidates. FPM Supp. 330-1, November 1972.

423. FPM. Supp. (Int.) No. 273-73 (March 1974) at 71-73.

424, The Commission states that BPME's role is not to review the job relatedness of a selection device but rather to ensure that whatever device is used is applied correctly and consistently. Hampton letter, supra note 7. Thus, for example, a rating schedule which places a premium on military experience would satisfy a BPME review if the schedule were applied equally to all candidates. Yet Title VII would require stricter scrutiny of the job relatedness of the provision since it would have an adverse impact on women.

The Commission's guidelines suggest, by example, that if a qualification standard, such as knowledge of advanced mathematics, impairs an agency's ability to recruit women or minorities, the agency should be required to review and report on the validity of that standard.[425] The guidelines do not, however, require that all qualification standards utilized by an agency be investigated for possible adverse effects on excluded or underrepresented groups. In addition, the guidelines suggest that if the evaluator finds that an agency consistently relegates women and minority group members to positions below their skill and ability levels, the agency should be advised to identify and eliminate the

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425. FPM Supp. (Int.) No. 273-73 (March 1974) at 71-74. The guidelines also suggest that "excessive credentialism" or the existence of qualification standards "...not solidly based on essential job requirements,..." should be eliminated. When excessive credentialism is discovered, the evaluator is instructed to "examine educational requirements and what abilities are needed to perform the work. Relate education and experience requirements to the identified needs of the specific position. Develop and use qualifications evaluation procedures which fairly recognize job-related education or experience." Id. at 77. The process by which requirements are related to the needs of the job, however, is not described. If an agency properly applies the Commission's standards, with a resulting discriminatory effect on women or minorities, the evaluator is instructed to report this finding to the Commission's Bureau of Policy Standards. As of December 1974, not one such report had been made. Telephone interview with Paul Wright, Chief, Planning and Review Section, BPME, CSC, Dec. 3, 1974.

practices causing this pattern.[426] However, the guidelines do not require that investigators routinely review personnel action files to determine if such a pattern exists.[427] In short, the guidelines include only examples of situations in which the evaluator comes upon a possible pattern of discrimination, but they do not provide any instructions pertaining to a systematic analysis which would uncover these patterns in the first place.

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426. Id. at 75. The guidelines also suggest that the evaluator be aware that discrimination may be indicated in "gerrymandering of functional lines of progression" or excluding from the promotion pool job categories in which women and minorities are concentrated. Id. at 77.

427. Additional EEO evaluation guidelines indicate that all personnel practices are subject to review and evaluation and state that "onsite factfinding" should include a review of personnel records, but no instructions are included on the procedure to be followed in reviewing personnel action files for violations of Title VII. The Commission noted that "The evaluator is expected to modify basic techniques for selecting samples and carrying out analytic functions to fit the subject matter he or she is reviewing." Hampton letter, supra note 7. FPM Supp. (Int.) No. 273-73, (November 1972) at A-36-37.

In addition to reviewing agency personnel practices for possible discrimination, the Commission's evaluation team is to assess the processing of complaints and the agency's affirmative action program to determine whether the action items are being implemented and whether they are adequate to meet objective EEO needs. Guidelines have been issued[428] instructing the evaluator to consider a checklist of relatively general questions, similar in nature to the questions agencies are to consider in conducting internal evaluations.[429] The only section of the affirmative action review guidelines suggesting any quantitative analysis pertains to the number of upward mobility participants, the number of target positions, and the number of participants placed in target positions.[430] The section concerning goals and timetables emphasizes that although goals should not be presumed to be quotas, the evaluator should scrutinize the agency's development of numerical objectives to assure that they are reasonable and were developed in accordance with the Commission's instructions. Evaluators may recommend the use of numerical goals but are prohibited from recommending what those objectives should be.[431]

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428. FPM Letter No. 273-73 (November 1972) at A-40-44; FPM Letter (Int.) No. 273-21 (April 1974).

429. For a brief discussion of agency internal evaluation guidelines, see Section V of this report, supra.

430. FPM Letter No. 273-24 (March 1974) (Attachment).

431. FPM Supp. (Int.) No. 273-73 (November 1972) at A-45.

Once the evaluation has been completed, the Commission prepares a report making findings and setting forth requirements and recommendations. Actions are required of agencies to correct regulatory or statutory violations. Actions are merely recommended if the evaluator determines that Title VII and the Executive order have been followed but additional measures would be useful or helpful.[432]

A review of 13 evaluation reports,[433] prepared during a five year period from 1969 to 1974, found that the Commission's analyses of agency practices had not improved since passage of the 1972 Amendments to Title VII.[434] The sample included six reports prepared prior to the extension of Title VII to Federal employment in 1972; of these, five concerned general personnel management, and one pertained specifically to EEO. Four of the six were nationwide reports, while two covered a specific installation. The seven reports prepared after the effective date of the 1972 Amendments included three nationwide reports on general personnel management, two nationwide reports on EEO, and two installation-level reports on EEO.

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[432] *Id*. at A-46.

[433] As noted above, the Commission conducts approximately 500-600 reviews per year. CSC believes that an inadequate number of reviews were analyzed by staff of this Commission. Hampton letter, *supra* note 7.

[434] The Commission took the position in 1972 that evaluation reports were exempt from the Freedom of Information Act, 5 U.S.C. § 552, and refused to disclose even portions of these reports to the public. In 1973, the United States Court of Appeals for the D.C. Circuit held that the Commission's blanket assertions did not justify withholding the documents from public disclosure and ordered the Commission to itemize the specific sections in the reports which the Commission viewed as exempt. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). The case was remanded to the U.S. District Court for the District of Columbia; and on October 9, 1974, that court held that the reports were not exempt from the Act's disclosure requirements except for those portions pertaining to specific individuals and to actions which the Commission orders the agencies to take to correct deficiencies. 383 F. Supp. 1049 (D.D.C. 1974). As of December 1974, the Commission appealed this decision. Since the litigation was pending, the Commission granted the staff of this Commission access to the evaluation reports with the understanding that no agencies would be identified.

All of the general review reports prepared prior to 1972 ignored the possible EEO implications of personnel practices which were otherwise inconsistent with Commission regulations. For example, where violations or irregularities were found in position classifications and merit promotion systems, no consideration was given to the impact of these factors on the employment of minorities and women. One agency was found to have segregated lines of progression which were functionally related and should have been integrated; yet the report failed to note that the segregation was sexually discriminatory, and no requirements or recommendations were included to provide relief to women excluded from the better jobs by virtue of that discrimination. Another agency's recruitment was found to be conducted predominantly through personal contact, yet no indication was given whether this practice had a racially discriminatory effect requiring corrective action.[435] Some of these general review reports contained short sections concerning the agency EEO program, but the analyses contained no references to the statistical compositions of the agencies' work forces by grade level or occupational classifications. One agency was considered in a 1971 report to have demonstrated that its actions clearly fostered progressive EEO efforts. Yet, this same agency in 1974 employed no minorities above grade 9, although 70 percent of nonminorities were in grades above that level.[436] When recommendations were made for improvements in EEO programs, they were extremely vague and did not provide for any specific relief to discriminatees. For example, in a nationwide report on the personnel practices of a medium-sized agency, the only recommendations concerning EEO were that the agency develop a more specific affirmative action plan and that it make a particular effort to recruit minority members for certain professional positions. There were no recommendations concerning employment of women.

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[435] Another example of these reports' failure to analyze general personnel practices from the standpoint of EEO was found in a section on labor relations. One agency's collective bargaining agreement stipulated that the agency would not follow the standard practice of considering automatically all eligible employees for a particular position, but instead would consider only those eligible employees who actually applied for the position. Since the existence of race and sex discrimination often deters minorities and women from applying for jobs, such a procedure could well have an additional discriminatory effect. Yet the report did not consider whether this collective bargaining agreement had any EEO implications.

[436] The average grade of all employees at this agency was 10.2 while the average grades for minorities and women were 5.6 and 6.6 respectively. These data were not cross-tabulated to show the position of minority women.

The special EEO evaluation report prepared during the same period of time, while superior to the general evaluations in analysis of possible discrimination, nevertheless contained some serious deficiencies. The report did not contain, for example, a thorough analysis of the status of women and minorities, cross tabulated by race, ethnicity, and sex in the agency's work force. The report found that the personnel management system operated to perpetuate past discrimination, that there was evidence of overt sexism and racism in supervisors' conduct and attitudes, and that the ratings system used criteria which were not job-related and had an apparently discriminatory effect. Although the Commission's staff found the existence of overt and systematic discrimination, it issued no requirements to the agency other than an instruction to maintain records on applicants and to review all temporary promotions. The report merely recommended changes pertaining to strengthening the EEO staff, correcting inadequacies in the complaint system, and improving the affirmative action plan and selection procedures. The Commission did not order the agency to take affirmative action with regard to the victims of discrimination or to establish goals and timetables.

The reports prepared after the enactment of the Title VII amendments in 1972 did not reflect any meaningful improvement in the quality of the Commission's evaluation of agency personnel practices in terms of equal employment opportunity.[437] The three general review reports did, however, include some analysis of the racial, ethnic, and sex compositions of the agency work forces, although these analyses tended to be limited to identifying problems of underutilization as a whole and not of underutilization within particular organizational units, occupational series, or grades.

These reports indicated that the Commission continued to fail to investigate the possibility of an adverse impact on minorities and women resulting from personnel practices which the Commission identifies as merit system violations. Numerous criticisms were made in these reports concerning agency practices in recruitment, hiring, training, performance evaluations, and promotion procedures, but there was no indication that the evaluators considered the impact of such practices on minorities and women. For example, in a detailed criticism of an agency's promotion practices, the Commission made no reference to the relationship of these practices to EEO. The Commission's review of promotion actions had found inconsistencies in the credits given to candidates and in the weights applied,[438] as well as

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437. The Commission recently wrote that it strongly disagreed with this generalization which it notes is based on a review of only 7 reports issued after the 1972 amendments, Hampton letter, supra note 7.

438. Inconsistencies in the relative weight given to categories of qualification, such as experience or education, are evidence that factors are being tailored to permit the selection of particular individuals. For example, if more weight is normally given to the ratings of candidates prior experience, but a particular candidate is selected because his or her rating on education is given more weight, that is evidence that the ratings schedule was altered in order that the candidate would achieve a higher total score and thereby be selected. Interview with Paul Leslie, Chief, Washington Operations Unit, BPME, CSC, Nov. 18, 1974.

strong evidence of preselection of candidates by supervisors; yet there was no indication that the Commission had investigated the personnel records to determine whether minorities and women had been exclusively affected by these practices or adversely affected more than other employees. More importantly, the Commission evaluators determined only whether criteria were consistently applied and did not scrutinize the ratings process to determine how candidates' qualifications were rated in relation to the criteria or whether the criteria were even job-related. For example, "experience" as a criterion was assumed to be a valid indicator of job performance. The evalutor looked to see whether over a period of time candidates with approximately the same numerical rating in the category of "experience" were selected for the same positions. However, no review was made to determine whether the types of experience given high ratings were in fact job-related or whether types of experience typical of a minority or sex group were given low ratings.[439] Thus, the Commission failed to determine whether the agency's ratings process was lawful under Title VII and, if unlawful, whether any victims of the discriminatory practice were entitled to priority consideration, retroactive promotion, backpay, or other relief Congress intended be provided by the Commission.

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[439] For example, the Commission requires that volunteer experience be credited in evaluating candidates when experience is a factor in determining eligibility. 5 C.F.R. § 302.302(c). If an agency tended to assign lower ratings to volunteer experience than to paid experience, such a practice could have a substantially adverse impact on the job opportunities for women, who are more likely than men to spend their early career years performing unpaid work in civic and philanthropic activities.

The general review reports revealed some evidence that the Commission's evaluations, themselves, might disparately affect women. Two of the reviewed reports included the results of the Commission's evaluation of the agency's position classifications. These evaluations are conducted to determine whether incumbent employees are performing duties consistent with the assigned position classification and at a level of difficulty and responsibility consistent with the assigned grade level. In one review, 100 percent of the reviewed positions held by females, but only 35 percent of the reviewed positions held by males, were required by the Commission to be downgraded. In the second report, 80 percent of the positions held by females and 60 percent of those held by males were downgraded.[440]

Two of the three general review reports considered the agencies' affirmative action programs only briefly, and the third did not consider affirmative action at all. The evaluations of action programs focused primarily on the agencies' EEO staffing problems and inadequacies in the affirmative action plans. No analysis was made to determine whether plan provisions which had been implemented had led to any results. Although one of the agencies had no minorities in a number of its regional offices and severe concentration of minorities and women at the lower grade levels, the evaluation report did not recommend that the agency consider developing numerical goals and timetables. Instead, the report recommended only that the agency "...concentrate efforts on identifying and attracting minorities...." to employment with the agency. In another case, the agency had developed goals and timetables, which were criticized by the Commission for having been developed, in part, on the basis of population statistics. None of the three general review reports required any actions of the agencies pertaining to equal employment opportunity.

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[440] Sex data were collected on the basis of the names of individual incumbents listed in the reports. Racial and ethnic identifications were not available. Position classification reviews are based primarily on interviews with the incumbents and their supervisors. The Commission's staff was asked to provide additional examples of position classification reviews in order to determine whether there was a pattern of similar disparities, but no additional reports were provided. Interview with Paul Wright, Chief, Planning and Review Section, BPME, CSC, Nov. 18, 1974.

The four special EEO review reports, prepared after 1972, included more thorough analyses of the work force participation of minorities and women. However, these reports failed to indicate that investigations had been made of supervisors' appraisals, ratings procedures, or merit promotion actions, all of which should be reviewed.[441] Required corrective actions generally pertained to implementing affirmative action measures outlined in the Commission's guidelines, such as the development of a system for evaluating supervisors' performances or designing special recruitment programs to attract certain underrepresented groups. No agency was required to develop numerical objectives, although the work force analyses implied that serious underutilization of women and minorities existed in certain grades and occupations at each agency. In some cases, the Commission evaluators found evidence of discrimination, but, instead of investigating further and requiring corrective action and relief to the victims, the Commission merely required the apparently discriminatory agency to investigate itself. One agency, for example, was ordered to determine the steps necessary for eliminating sexually discriminatory practices in recruitment, appointment, and assignment; yet the Commission did not investigate or order the agency to investigate which women had been discriminatorily placed

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441. The Commission has indicated that a report may be silent on a particular aspect of the review because no problem was identified. Hampton letter, supra note 7. However, if the Commission does not require full reporting by its evaluators, it is precluded from uncovering errors by its own staff.

into inferior jobs and were, therefore, entitled to certain transfer rights and possibly retroactive relief.

It, therefore, appears on the basis of a limited review of CSC reviews that the Commission has not made meaningful improvements since 1972 in its evaluations of agencies' personnel practices as they bear on equal employment opportunity. Further, the Commission has failed to exercise the expanded authority it was granted by Congress in 1972 to correct discriminatory practices and to give relief to victims of discrimination.[442]

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[442] The Commission maintains that the passage of the 1972 Amendments to Title VII required "a greater depth and intensity of evaluation, rather than a totally different approach." The Commission believes that its evaluations, and the changes which have been implemented since 1972, have been responsive to congressional intent. In addition, in its opinion, the foregoing analysis of its evaluation reports "(a) was so selective as to distort the picture, (b) paraphrased CSC findings in loaded terms, and (c) wrenched conclusions from CSC findings which go beyond what the facts would support." Hampton letter, *supra* note 7. Since the Commission has heretofore maintained that its complete evaluation reports are not subject to disclosure under the Freedom of Information Act, unfortunately this Commission is precluded from quoting from the reports to support the conclusions drawn.

Chapter 2

CIVIL SERVICE COMMISSION

BUREAU OF INTERGOVERNMENTAL PERSONNEL PROGRAMS (BIPP)

I. Introduction

One important source of increased employment opportunities for all Americans is State and local government agencies. These governmental units are among the largest employers in the Nation.[443] In 1950, State and local employment accounted for 4.1 million workers and, in October 1972, the employment level was 9.1 million. The International City Management Association forecasts a rise in State and local employment to well above 10 million by 1975.[444] These figures become even more impressive when compared to other large industries. For example, employment in the wholesale trade industry grew only from 2.2 million in 1960 to 3.1 million in 1970.[445]

Not only do State and local governments offer a considerable number of jobs with relatively higher pay and greater security than the private sector, but the quality of services they render to the public is related to the nature of their work force. In the last 35 years the role of government has expanded significantly and now touches every aspect of our lives. State and local governments are the major providers of such important services to the community as education, health care, income security, transportation and sanitation systems, and police and fire protection.

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[443] For example, New York City has 406,636 employees; there are 317,372 public employees in the Los Angeles area; and 257,439 in the Chicago area. U.S. Department of Commerce, Bureau of Census, Local Government Employment in Selected Metropolitan Areas and Large Counties 1973, Table 4 (November 1974).

[444] The International City Management Association, The Municipal Year Book of 1971 190.

[445] U.S. Census of Population: 1960, Vol. I, Characteristics of the Population, Part 1, United States Summary, Table 92; Census of Population: 1970, General Social and Economic Characteristics, Final Report PC(1)-C1, United States Summary, Table 92.

Underutilization of a segment of a population in a bureaucracy inevitably affects the quality of services furnished. A bureaucracy which utilizes the services of all groups ensures that all values and interests are articulated and hence brought to bear upon the decisions made and the policies formulated by it. It will be better able to discharge its functions and serve the public because of the wider range of talents, social experiences, and contacts of its employees. Monolithic bureaucracies are apt to suffer from a lack of diversity of opinion, equalitarianism, and impetus for change. Of similar importance is that such a bureaucracy has the effect of discouraging those whose groups are excluded from it from believing in the fairness of the actions of this important non-elected arm of the American system of government.[446]

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446. See H. Kranz, Are Merit and Equity Compatible, 5 Pub. Ad. Rev. 434 (September/October 1974). Also see S. Krislov, Representative Bureaucracy 64, 65 (1974); and Address by Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Regional Civil Rights Conference, Boston, Mass., Sept. 22, 1974.

See also Advisory Council on Intergovernmental Personnel Policy, More Effective Public Service, Supplementary Report to the President and the Congress (October 1974). In July 1974 the Advisory Council on Intergovernmental Personnel Policy adopted the following statement:

> The Council believes that representativeness in the workforce is a desirable goal of public personnel policy.... The Council further believes that it is particularly important at this time in our history that women, persons of minority races, and others who have not been adequately represented in government be in the public service and hold high and responsible positions in it. A representative workforce will increase the credibility of government and the citizens' ability to identify with it. It will stand as a visible symbol of our national unity. Id. at 5.

The Advisory Council did not believe that it was necessary to subordinate merit principles to achieve a representative work force. In fact, it stated and this Commission concurs that "...entry into and advancement in the public service must remain, in the first instance, a matter of individual fitness and ability." Id. See also the separate statement of Ersa H. Poston, Chairman of the Advisory Council and President of the New York State Civil Service Commission, at 44.

Women and minorities are underrepresented in many State and local government positions, especially at the higher salaried and professional and managerial levels. A 1973 report by the Equal Employment Opportunity Commission concerning the utilization of minorities and women by State and local governments found that, although blacks constituted 13.7 percent of all employees covered by the report, almost 70 percent of them were in the three job categories with the lowest median salaries ($7,000 or less): service/maintenance (35.9 percent), office/clerical (17.2 percent) and para-professional (15.8 percent). Yet only 41 percent of all white employees held jobs in those categories. On the other hand, while 24 percent of all whites held the top paying jobs of administrators and professionals (median salary: $11,000 or more), only 10 percent of all blacks held such positions.[447]

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[447] U.S. Equal Employment Opportunity Commission, Minorities and Women in State and Local Government 1973, Vol. 1, United States Summary xii. The data in the report are based on statistics filed by State and local governments in accordance with the Equal Employment Opportunity Act of 1972. The data collection instrument was the EEOC's State and Local Government Information form (EEO-4). Data do not include employees of public elementary and secondary school systems or higher educational institutions, which are excluded from the scope of this reporting system as are all local governments with less than 100 employees. Data on State governments also do not include statistics for Alabama, Connecticut, District of Columbia, Mississippi, New Hampshire and North Dakota. These States either did not file, filed too late for inclusion, or filed in a format that was not compatible with EEOC's data system.

In one city, St. Louis, in June 1974 more than 86 percent of the black male and female employees, and 75 percent of white female employees earned less than $10,000, while only 32.5 percent of white male employees were at that pay level.

Spanish Surnamed Americans represented 3.3 percent of the total employment covered by the report. This group fared only slightly better than blacks in terms of the level of positions held. For example, more than 60 percent of Spanish Surnamed American State and local government workers were concentrated in the three lowest job categories and only 12 percent were in the administrator or professional categories.[448] In addition, Spanish Surnamed Americans were paid consistently lower median salaries than Anglo workers in the same job categories, with gaps between median annual salaries ranging from $100 per year for para-professionals to $950 for administrators.

Women represented 34.7 percent of all employees in the survey. The two lowest paying job categories, office/clerical and pa_a-professional, were overwhelmingly female.[449] Some 62 percent of all women were in those positions compared with only 8 percent of all men. Even so, women earned median annual salaries $1,000 to $1,200 lower than those for men in the same categories. While a slightly greater proportion of women than men (17 versus 15 percent) were professionals, women earned $1,200 less than men in the identical job category. The greatest male/female discrepancy in median salaries within a job category was the $3,300 difference in the amount paid to male versus female skilled craft workers. Overall, women earned a median annual salary $2,600 lower than men ($9,603 versus $7,030).[450]

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[448] Id. at xvii. Only 41 percent of Anglo workers were in the service/maintenance, office/clerical, and para-professional categories while 24 percent of them were administrators or professionals.

[449] Id. at xix. Women constituted 85 percent and 65 percent, respectively of these categories.

[450] Id.

Other studies of the employment practices of State and local governments have also established the broad discrepancies between the promise of equal job opportunities and its fulfillment.[451] In 1973, in Rhode Island women constituted 44.8 percent of State employees ; however, they held only 28.6 percent of State jobs over $10,000 per year and only 16.5 percent of State positions paying more than $16,000 per annum.[452] A similar analysis of State employment in four urban areas of New Hampshire[453] found that in 1972 women made up 39 percent of the State government's work force in the four cities but that these women State employees held only 13.8 percent of positions paying more than $10,000 per year. Moreover, 38.5 percent of these women employees were working at jobs paying less than $6,000 per year while only 8.2 percent of their male counterparts held positions at that pay level.[454] Also, a California study reported that women comprised 37.7 percent of the California State civil service in 1974 but that 80.7 percent of women State employees made less than $900 per month in comparison to only 26.3 percent of men employed by the State.[455]

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451. For additional data which indicate similar, prior patterns of discrimination see U.S. Commission on Civil Rights, For ALL the people . . . By ALL the people (1969).

452. Rhode Island State Advisory Committee to the U.S. Commission on Civil Rights, Minorities and Women In Government: Practice Versus Promise 6,8 (January 1975).

453. These cities were Berlin, Manchester, Nashua, and Portsmouth.

454. New Hampshire State Advisory Committee to the U.S. Commission on Civil Rights, The State of New Hampshire as an Equal Opportunity Employer 10 (October 1974).

455. California State Personnel Board, Special Report on the Status of Women in the California State Civil Service 3,11 (October 1974).

The Mississippi Council on Human Relations reported that in 1973, 68 agencies and departments of the State government, which employed 13,070 persons, had a black employment rate of 5.8 percent[456] although blacks constituted 36.8 percent of Mississippi's population.[457] In the Mississippi Welfare Department, one of the largest State agencies, blacks held only 4.2 percent of all jobs at both the State and county levels. In 34 counties there were no blacks working in the county welfare offices. These 34 counties include seven in which blacks constituted a majority of the citizens.[458]

In Alabama blacks comprise 26.8 percent of the State's population.[459] In 1972, however, in the State's health and social services, employment security, and civil defense agencies blacks held only .3 percent of the executive-managerial positions, 5.4 percent of the professional-technical positions, and 5.7 percent of the clerical-office jobs.[460]

Similarly, although American Indians made up 7.2 percent of New Mexico's population, they occupied only 1.9 percent of the State jobs in 1972.[461] In Arizona, American Indians comprised 5.4 percent of the

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[456] The Mississippi Council on Human Relations, Mississippi, Hardly an Equal Opportunity Employer 6 (1974).

[457] U.S. Census of Population:1970, Vol. 1, Characteristics of the Population, Part 26, Mississippi, Table 18.

[458] The Mississippi Council on Human Relations, supra note 456, at 24. The seven counties are Carroll, Holmes, Humphreys, Tunica, Montgomery, Quitman, and Tallahatchie.

[459] U.S. Census of Population:1970, Vol. 1, Characteristics of the Population, Part 2, Alabama, Table 18.

[460] U.S. Civil Service Commission, Qualitative Evaluation of the Alabama Department of Personnel (January 1973).

[461] U.S. Commission on Civil Rights, Staff Report No. 1, Southwestern Regional Office, Socio-Economic Profile on American Indians in Arizona and New Mexico 26 (1972). Only 198 American Indians were employed out of a total of 10,557 State employees.

State's population, but held only 1.1 percent of State jobs in 1973.[462]

In New Haven, Connecticut, estimates of the percentage of the city's population that was Spanish speaking in 1971 ranged from 4.7 to 8.7.[463] Spanish speaking employees, however, held just 1.9 percent of the city's full-time positions. The New Haven Police Department had only 5 Spanish speaking officers out of 513 members.[464]

Similarly, it was estimated that Puerto Ricans constituted 13.4 percent of New York City's population in 1970.[465] Yet Puerto Rican employees comprised only 5.7 percent of State employees in that city in 1970.[466]

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462. Arizona State Advisory Committee to the U.S. Commission on Civil Rights, Indian Employment in Arizona Table 9 (February 1975). Arizona State agencies employed only 353 American Indians out of a total work force of 31,102 persons.

463. The New Haven City Planning Commission estimated a Puerto Rican community of 4.7 percent while Junta, a local Hispanic Community organization estimated the total Spanish speaking population at 8.7 percent. Connecticut State Advisory Committee to the U.S. Commission on Civil Rights, El Boricua: The Puerto Rican Community in Bridgeport and New Haven 1 (January 1973).

464. Id. at 2,3.

465. New York State Advisory Committee to the U.S. Commission on Civil Rights, The Puerto Rican and Public Employment in New York State 11 (April 1973).

466. Id. Several cities with high enrollments of Spanish speaking pupils in their elementary and secondary schools have disproportionately low numbers of Spanish speaking teachers. In New York City, which has a Spanish speaking student enrollment of 26.6 percent, only 2.2 percent of elementary and secondary teachers are Spanish speaking. Children of Spanish speaking parents in Los Angeles comprise 23.9 percent of the student population yet only 2.8 percent of Los Angeles' elementary and secondary teachers are Spanish speaking. In Denver 23.3 percent of the school children are Spanish speaking while only 3.2 percent of that city's elementary and secondary school teachers are Spanish speaking. U.S. Department of Health, Education, and Welfare, Office for Civil Rights, Directory of Public Elementary and Secondary Schools in Selected Districts-Enrollment and Staff by Racial/Ethnic Group (Fall 1972).

The Equal Employment Opportunity Act of 1972 prohibited employment discrimination by State and local governments and gave the Department of Justice the authority to bring suit where there was an indication of a pattern and practice of discrimination by State and local government employers. Between the effective date of the Act, March 24, 1972, and March 1974, the Department of Justice has filed 16 legal actions involving charges of discrimination against State and local governments.[467] The Department of Justice found, for example, that in 1974 only 69 of Philadelphia's police officers were female and that the police department did not recruit, hire, and promote women on an equal basis with men.[468] Similarly, the Department asserted in October 1974 that the city of Milwaukee, Wisconsin, discriminated against women and blacks in police and fire department employment practices. Of the city's 2,200 police officers, only 16 were women and 58 were black while none of the city's 1,120 firefighters were women and only six were black men.[469] In a suit against Jackson, Mississippi, the Department, which alleged discrimination against blacks and women in all city employment, found that while the city's population was almost 40 percent black, less than 27 percent of its employees were black and most of them were in the lowest paying jobs.[470] Further, women constituted only 16 percent of the employees of the city government.[471]

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[467] The legal actions involved the following State and local governments: Maryland, Nevada, Albuquerque, Boston, Buffalo, Chicago, Dallas, Jackson, Los Angeles, Memphis, Milwaukee, Montgomery, Philadelphia, and St. Louis.

In addition to the legal actions filed by the Department of Justice, there were 13 instances of litigation in which State and local governments receiving Federal monies from the Law Enforcement Assistance Administration of the Department of Justice were charged with discrimination during fiscal years 1972 and 1973. See U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort--1974 Vol. VI (in print). Further, in the first year that State and local governments were subject to the provisions of Title VII of the Civil Rights Act of 1964 there were 3,056 complaints filed against them with the Equal Employment Opportunity Commission.

[468] Department of Justice, Special Monthly Report to Minority News Media, Mar. 5, 1974.

[469] Department of Justice Press Release, Oct. 17, 1974.

CSC points out that, while it does not doubt the accuracy of the employment statistics incorporated in this report, it believes that if the data presentation were limited to the major grant-aided agencies for which it has responsibility and a comparison made to work force data, a completely different conclusion would be reached in regard to the utilization of minorities and women. For instance, it indicates that in 45 of the 50 States, the major grant-aided programs subject to a Federal merit requirement have achieved at least balanced staffing in terms of work force comparisons. More specifically, using CSC data the percentage of those in the work force in State and local public welfare, public health, and social security agencies in 1973 who were female or black was appreciably higher than those groups' percentage of the Nation's work force in 1970.[472]

CSC acknowledges, however, that serious problems remain.[473] Yet, this Commission has found that CSC enforcement of its civil rights responsibilities in the area of State and local government employment is deficient. As noted in Chapter 1 of this report and as will be discussed below, there are fundamental philosophical difference between the positions of CSC and this Commission. These matters concern the nature and extent of affirmative action which must be required to overcome the effects of an underutilization of minority group members or women. The disagreement is most manifest in the requirements imposed by CSC on those governmental agencies over which it has authority.

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[470] Telephone interview with Lorna Grenadier, Research Analyst, Employment Section, Civil Rights Division, Department of Justice, Jan. 3, 1975.

[471] Id. The Department found a similar situation in Montgomery, Alabama. Although blacks constituted more than a third of the city's population they accounted for only 22 percent of the city's 2,050 person work force and moreover, they had the lowest paying jobs. Id.

[472] Letter from Robert Hampton, Chairman, U.S. Civil Service Commission, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, May 2, 1975. Even using CSC data the percentage of Spanish surnamed employees of the three Merit Standard agencies was below that group's participation rate in the Nation's work force. Id.

[473] For example, CSC recognizes that a disproportionate number of minority members and women are in low paying job. Id.

In order for full compliance to be achieved with any governmental order as complex as those for ensuring equal employment opportunity, it is essential that clear and unambiguous guidelines be issued by the enforcing agency. Such guidelines not only provide detailed instructions on how to come into compliance, but they set the tone for the enforcement program. If they indicate unqualified agency support for the goal to be attained, then voluntary conformity with the law is more likely. CSC, however, has not published such guidelines. As will be shown below, CSC has sounded an uncertain bugle; it has made vague statements subject to varying interpretations. Its guidelines do not acknowledge that some traditional civil service practices have to give way to the mandates of Title VII and it has refused to utilize the affirmative action standards that the Department of Labor has imposed on Federal contractors for the last four years.

II. Responsibilities

On January 5, 1971, the Intergovernmental Personnel Act of 1970 (IPA) was enacted into law. As envisioned by Congress, the IPA was designed to reinforce the Federal system by strengthening the personnel resources of State and local governments, imposing intergovernmental cooperation in the administration of grant-in-aid programs, providing grants for improvement of State and local personnel administration, authorizing Federal assistance in training State and local employees, providing grants to State and local governments for training of their employees, authorizing interstate compacts for personnel and training activities, and facilitating the temporary assignment of personnel between the Federal Government and State and local governments.

The IPA requires that Federal financial and technical assistance to State and local governments be consistent with the merit principles enumerated in the Act, especially the fair treatment principle which requires:

> assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, or religious creed and with proper regard for their privacy and constitutional rights as citizens; ... 474

Thus, CSC has an overall responsibility under the IPA for assuring equal employment opportunity for all persons to whom the Act's provisions apply. In addition, there are also two major responsibilities with specific civil rights implications assigned to CSC by the IPA; the overall administration of the Federal Merit Systems Standards and management of a grant program.

The Merit System Standards require that State employees administering certain federally-aided programs be selected, promoted,and compensated according to a federally-approved, State-administered merit system. As originally established, the Merit System Standards were designed to bring about more efficient administration of the Social Security Act programs in the face of the waste, inefficiency, and political influences identified in

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474. The other five principles are:

> (1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment; (2) providing equitable and adequate compensation; (3) training employees, as necessary, to assure high quality performance; (4) retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected;... (6) assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office. Intergovernmental Personrel Act of 1970, 42 U.S.C. § 4701 (1970).

its first years.[475] In 1963 the Standards were revised to prohibit discrimination on the basis of race and national origin,[476] and in 1971 the Standards were revised again to include age, sex, and physical requirements as prohibited factors in the employment process. The Standards issued in 1963 not only prohibited discrimination but also required that the States provide appeals rights for persons alleging discrimination. This was strengthened when the Standards were revised in 1971 to require that the decisions in such discrimination complaint cases would have to be binding on State and local agencies.[477]

In 1971 the Federal Merit Standards were applicable to more than 30 Federal programs funded by four Federal agencies. The Department of Health, Education, and Welfare funds the greatest number of programs subject to the Federal Merit System Standards,[478] with the Department of Labor funding a

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[475] In 1939, President Roosevelt, realizing that the administration of federally-aided programs under the Social Security Act of 1935 was inadequate, recommended that States be required, as a condition for the receipt of Federal funds, to establish and maintain a personnel merit system. Acting on President Roosevelt's recommendation, Congress amended the provisions of the Social Security Act to provide for personnel merit systems. U.S. Civil Service Commission, Civil Service Journal 39 (January-March 1973).

[476] This was effected by publishing regulations in the Federal Register. 28 Fed. Reg. 734-6 (1963). The new provision read:

> Discrimination against any persons in recruitment, examination, appointment, training, promotion, retention, or any other personnel action, because of political or religious opinions or affiliations or because of race, national origin, or other non-merit factors will be prohibited. Id. at 735.

[477] The 1971 revision was effected by publishing regulations in the Federal Register, 36 Fed. Reg. 4498 (1971). The new provision read:

> Discrimination on the basis of age or sex or physical disability will be prohibited except where specific age, sex, or physical requirements constitute a bona fide occupational qualification necessary to proper and efficient administration. The regulations will include provisions for appeals in cases of alleged discrimination to an impartial body whose determination shall be binding upon a finding of discrimination. Id. at 4499.

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Programs	Statutory Reference (1970)*
Comprehensive Health Planning	42 U.S.C. § 246(a)(2)(F)
Comprehensive Public Health Services	42 U.S.C. § 246(d)(2)(f)
Medical Facilities Construction and Modernization	42 U.S.C. § 291(d)(a)(8)
Old-Age Assistance	42 U.S.C. § 302(a)(5)(A)
Aid to Families with Dependent Children	42 U.S.C. § 602(a)(5)(A)
Maternal and Child Health Services/ Crippled Childrens Services	42 U.S.C. § 705(a)(3)(A)
Aid to the Blind	42 U.S.C. § 1202(a)(5)(A)
Aid to the Permanently & Totally Disabled	42 U.S.C. § 1352(a)(5)(A)
Aid to the Aged, Blind or Disabled	42 U.S.C. § 1382(a)(5)(A)
Medical Assistance	42 U.S.C. § 1396a(a)(4)(A)
Developmental Disabilities Services and Facilities Construction	42 U.S.C. § 2674(b)(7)
Community Mental Health Centers Construction/Children's Mental Health Facilities Construction/Narcotic Addict Rehabilitation Facilities Construction	42 U.S.C. § 2684(a)(6)
Older Americans	87 Stat. 41
Nutrition Program for the Elderly	86 Stat. 92
Comprehensive Alcohol Abuse & Alcholism Prevention, Treatment & Rehabilitation	42 U.S.C. § 4573(a)(5)
Surplus Property Utilization	45 C.F.R. § 14.5(b)(3)(i)
Child Welfare Services	45 C.F.R. § 220.49(c)
Vocational Rehabilitation Services	29 U.S.C. § 35(a)(6) & 45 C.F.R. § 401.12.
Vocational Evaluation & Work Adjustment	45 C.F.R. § 402.7

*Unless otherwise noted, all U.S.C. references are from the 1970 edition. All C.F.R. references are to the 1974 edition, as supplemented February 1975.

few such programs[479] and the Departments of Defense[480] and Agriculture[481] each funding one program covered by Merit System Standards. These programs will involve over $17 billion in Federal expenditures during fiscal year 1975[482] and are administered by State and local government agencies with more than 400,000 employees.[483]

The Intergovernmental Personnel Act transferred responsibility for overseeing administration of the Federal Merit System Standards from the Department of Health, Education, and Welfare's Office of State Merit Systems to CSC. The Office of State Merit Systems of HEW was not an operating agency which made grants of funds to State agencies. It functioned essentially in an advisory capacity to State agency officials regarding merit systems efficiency and to Federal operating agencies regarding compliance of State agencies with the Federal standards. In performing its advisory functions, however, the Office of State Merit Systems had a responsibility to develop policies and procedures and to conduct performance reviews.

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[479] Employment Security — 42 U.S.C. § 503(a)(1)
Occupational Safety & Health Standards — 29 C.F.R. § 1902.3(h)
Occupational Safety & Health Statistics — BCS Grant Application Kit, May 1, 1973, Supplemental Assurance No. 15A

[480] Civil Defense Personnel and Administrative Expenses 50 U.S.C. App. 2286(a)(4).

[481] Food Stamp 7 C.F.R. § 271.1(g).

[482] Memorandum from Michel E. Renton, Office of Merit Systems, Bureau of Intergovernmental Personnel Programs (BIPP), CSC, to Lawrence D. Green, Director, Office of Merit Systems, BIPP, CSC, June 5, 1974, Subject Reference: 1975 Budget Requests for Grant-in-Aid Programs Subject to the Merit System Standards.

[483] Letter from Joseph M. Robertson, Director, BIPP, CSC, to Diane Graham, Associate Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Aug. 9, 1974.

In administering the merit system standards, CSC plays a role similar to that of HEW's Office of State Merit Systems.[484] It is responsible for conducting evaluation reviews of State and local grant-aided agencies to determine conformity with the equal employment opportunity provisions of the standards and for advising the Federal grantor agencies as to the application of the Standards and recommending and coordinating actions necessary to assure compliance with them. It is the four Federal grantor agencies, however, who have the authority to impose sanctions in the case of noncompliance. CSC may only recommend that such corrective actions be taken. It has no authority to order the termination of funds or to bring court action.

The Civil Service Commission's other major area of equal employment opportunity responsibility under the Intergovernmental Personnel Act involves the IPA grant program. Under this program CSC distributes funds to State and local governments for personnel management improvements or staff training, CSC's budget allocation for the IPA grant program is $15,000,000 for fiscal year 1975. In fiscal years 1974 and 1973 it was $10,000,000 and $15,000,000, respectively.[485]

Individual grant projects may be broad or narrow in scope, and short-term or multi-year in duration.[486] They may be for planning, developmental, or operational purposes. They may constitute a new program or be an expansion or intensification of an existing one. IPA projects may benefit any organizational element of a jurisidiction being funded, including the judicial, legislative, and executive branches of government. Examples of projects funded by IPA grants in fiscal year 1973 include: a grant to Alaska to provide investigative and enforcement training for two field representatives of the Alaska Human Rights Commission; a grant to California to provide basic training in legislative operations for newly elected State senators and assemblymen; a grant to the city of Lincoln, Nebraska, to study organization and administration of public services; a grant to the city of Bellevue, Washington, to train Medic I Paramedics in mobile emergency intensive coronary care.[487]

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[484] In a report on equal opportunity in State and local government employment this Commission in July 1969 described the Office of State Merit Systems as hesitant to forcefully implement provisions of the merit system standards relating to equal employment opportunity. For ALL the people...By ALL the people, supra note 451, at 117.

[485] In fiscal year 1974 CSC funded 11 grantees and in fiscal year 1973, 175 grantees were funded. Telephone interviews with Allan Heuerman, Associate Director, Grants Administrative Division, Bureau of Intergovernmental Personnel Programs, CSC, Apr. 10, 1975; and Ellen Russell, staff member, Grants Administration Division, Bureau of Intergovernmental Personnel Programs CSC, Nov. 13, 1974.

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[486] IPA grants are usually made for a period of 12 months duration with a maximum period of 15 months, although in a special case an exception may be made. The projects which are set up with the grants, however, may be designed for a period of 2, 3 or more years. The IPA grant must be renewed by CSC at the end of the 12 month cycle or whatever time period is decided upon in order for the program to continue to receive IPA grant money.

[487] Additional examples of IPA grants made to State and local governments are: a grant to the University of Georgia to develop a lending library of training programs for public employees throughout the State; a grant to South Dakota to conduct a cooperative salary survey within the State; a grant to Texas to establish an Office of Equal Employment Opportunity in the Governor's Office; a grant to Vermont to develop more valid and useful methods of testing and selection for State employment; a grant to the city of San Jose, California to develop a job-related test validation program for all city classifications; and a grant to the city of Weirton, West Virginia to establish basic personnel systems for the cities of Weirton and Steubenville, Ohio. U.S. Civil Service Commission, Grant Awards for Fiscal Year 1973 (August 1973).

CSC notes that the major equal opportunity impact of the grant programs is not through civil rights enforcement but through the projects being given grant support. It points out that as of October 1974 there were 60 grant projects specifically for equal employment opportunity and an additional 141 which related to recruiting, examining and selection, matters which would impact on equal employment opportunity. CSC cited as examples of projects undertaken with IPA support a study of the employment of women in Wisconsin State government, a guide on equal employment opportunity and affirmative action issued by the League of Kansas Municipalities, a study in Santa Cruz, California of the county's pre-employment personnel policies and procedures with a view toward removing artifical barriers to entry level employment, and a study of police officer height requirement in Atlanta, Georgia. Hampton letter, *supra* note 472.

CSC's equal employment opportunity responsibilities under the IPA grant program are those of a Federal grantor agency. Federal funding agencies have an enforcement responsibility under Title VI of the Civil Rights Act of 1974 to ensure that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[488] Thus, CSC has the responsibility for investigating complaints of discrimination by beneficiaries of IPA grant programs, conducting compliance reviews of IPA grantees, and resolving issues of noncompliance by negotiation or, where that fails, initiating fund termination procedures.

Title VI does not proscribe discrimination based on sex or religion. Nor is it directly applicable to the employment practices of recipients.[489] Since the merit principles of the IPA, however, do cover the employment practices of the agency or organization administering the grant and require fair treatment of all employees regardless of race, color, national origin, sex, or religion,[490] CSC developed specific regulations which apply these mandates to IPA grantees.[491] Under these Nondiscrimination and Equal Employment Opportunity Regulations CSC has compliance responsibility for investigating all complaints of discrimination concerning IPA grants, conducting compliance reviews of IPA grantees, and resolving any issues of noncompliance.

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[488] Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1970).

[489] Employment practices are covered by Title VI only in those cases where providing employment is a primary purpose of the assistance statute or where discrimination in employment will affect the services available in the assistance program, e.g., discrimination in the selection of school teachers or doctors in a hospital affects the likelihood of discriminatory treatment of the students or patients.

[490] Intergovernmental Personnel Act of 1970, 42 U.S.C. § 4701 (1970).

[491] 5 C.F.R. § 900.401.

III. Organization and Staffing

A. Central Office Structure

The Bureau of Intergovernmental Personnel Programs (BIPP) was established within the Civil Service Commission to discharge the agency's responsibilities under the IPA. Initially, BIPP's structure consisted of the Office of the Director of BIPP and five line offices that reported to the Director. The five offices were: Office of Program Management, Office of Grant Operations, Office of Grant Planning, Office of Merit Systems, and Office of Technical Assistance.[492]

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[492] The major functions and responsibilities of these offices prior to a 1974 reorganization were:

Office of Program Management
Prepared budget estimates and staff requirements for the Commission-wide Intergovernmental Personnel Program; recommended allocation of administrative resources among Commission offices and monitored progress against resources allocations; provided personnel and administrative support services for the Bureau.

Office of Grant Operations
Developed operational procedures and instructions for the administration of the IPA Grant Program in the Commission's central and field offices, including forms, guidelines, and standards.

Office of Grant Planning
Developed new or revised policies or procedures for administration of the IPA grant program, including formula for allocation or reallocation of funds among States and local jurisdictions, and the utilization of discretionary funds by governmental jurisdictions and other eligible grantees.

Office of Merit Systems
Developed and monitored the program for operation of a merit system of personnel administration to be followed by State and local governments as a condition of participation in certain Federal grant-in-aid programs.

Office of Technical Assistance
Developed and recommended Commission-wide programs of technical assistance to improve all aspects of State and local government personnel administration, including that to be provided on a nonreimbursable, shared cost, or reimbursable basis; developed, fostered and monitored the personnel mobility activities of Federal agencies, State and local governments, and universities.

On March 20, 1974, the Bureau was reorganized based on the findings of an internal audit of BIPP conducted by the CSC's Office of Management Analysis and Audits. As a result of the reorganization the Office of Program Management was renamed the Office of Evaluation and Program Management. The Office of Grant Operations and the Office of Grant Planning were consolidated into one unit, the Grants Administration Division. The Office of Merit Systems was combined with the Office of Technical Assistance to form the Personnel Management Assistance Division. A new office, the Office of Faculty Fellows and Personnel Mobility, was established within BIPP.[493]

These offices together with the Office of the Director comprise BIPP's central office structure. As of June 30, 1974 there were 41 professional employees on BIPP's central office staff.[494]

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[493] The major functions of the BIPP components established after the reorganization are:

Office of Evaluation and Program Management

Prepares long-range financial plans, annual budget estimates , and justifications for the nationwide operation of the IPA programs. Provides administrative services for the Bureau.

Grants Administration Division

Administers the nationwide IPA grant program.

Personnel Management Assistance Division

Administers the nationwide merit systems and technical assistance programs for State and local governments.

Office of Faculty Fellows and Personnel Mobility

Manages the nationwide faculty fellows program and the intergovernmental personnel mobility program. This Office was formed by taking the Personnel Mobility or talent-sharing program from the Office of Technical Assistance and combining it with the Faculty Fellows Program which was transferred to BIPP on December 10, 1973 from the CSC's Bureau of Training. The Faculty Fellows program is not an IPA function. It deals with the assignment of university professors to Federal agencies. The transfer of responsibility for the Faculty Fellows program to BIPP was based on a recommendation made by an internal Commission task force on CSC-university relationships.

[494] Robertson letter, supra note 483.

BIPP's central office staff is responsible for ensuring that CSC's civil rights responsibilities under the Merit System Standards and the IPA grant program are carried out. These responsibilities are discharged through the Personnel Management Assistance Division and the Grants Administration Division.

BIPP's Personnel Management Assistance Division is responsible for providing guidance, advice, and assistance to the CSC regional offices on the administration of the merit standards and technical assistance programs. It develops for CSC regional staff and Federal grantor agencies equal employment opportunity policies, regulations, and guidelines. Further, it provides instructions to regional staff for reviewing State and local agencies' conformance with the Merit System Standards including those elements of the review which relate to equal employment opportunity.[495] It also assists regional staff in complex or sensitive negotiations with State and local government agencies concerning the Merit System Standards' equal employment opportunity requirements.

The Personnel Management Assistance Division also develops materials informing State and local governments of their equal employment opportunity responsibilities under the Merit System Standards. The Division maintains liaison with other government agencies and private organizations concerned with equal employment opportunity.[496]

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495. Under the Merit System Standards, regional staff conduct indepth evaluations of the operations of State and local government agencies called qualitative evaluations. A part of these reviews concerns equal employment opportunity. On occasion reviews solely based on civil rights are also conducted. These are also called qualitative evaluations. For more information on these reviews, see p. 186 infra.

496. CSC Operations Memo. 713-38 (Oct, 7, 1974) and BIPP Functional Statements, undated.

BIPP's Grants Administration Division generally oversees the operation of the IPA grant program and thus is responsible for discharging CSC's obligations under Title VI of the Civil Rights Act of 1964 and CSC's equal employment opportunity regulations. In carrying out these responsibilities the Grants Administration Division develops policies, regulations, procedures, and guidelines for CSC regional staff. It also establishes yearly compliance review workloads for the regional offices and monitors the compliance reviews and complaint investigations they conduct. Further, it prepares materials which inform IPA grantees of their equal employment opportunity responsibilities and maintains liaison with other government agencies and private organizations concerned with civil rights.[497]

B. Regional Office Operations

BIPP's regional staff are directly responsible for ensuring compliance with CSC's civil rights regulations by State and local government agencies. They conduct compliance reviews under the IPA grant program and the Merit System Standards and are responsible for investigating discrimination complaints in the grant program. They also participate in negotiations with State and local agencies aimed at resolving issues of noncompliance.[498]

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[497] CSC Operations Memo. 713-38, supra note 496.

[498] BIPP Functional Statements, undated. Regional staff disseminate to State and local government agencies equal employment opportunity informational materials concerning the Merit System Standards and the IPA grant program. They are also responsible for establishing and maintaining liaison at the local level with other government agencies and private organizations concerned with equal employment opportunity. Id.

Each regional office has an Intergovernmental Personnel Programs Division. The chief of each of these divisions reports to BIPP's central office through CSC's regional directors.[499] Similarly, directives from BIPP's central office come to the Intergovernmental Personnel Programs Division through the regional directors. The BIPP regional staff cannot take direct civil rights enforcement actions themselves. Rather they make recommendations to the regional directors, who make the final decisions in all such matters.[500]

The regional staffs vary from region to region in size and structure.[501]

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[499] The Regional Director has broad responsibility for the planning, managing and operating of Intergovernmental Personnel Program activities carried out in the region. He or she is delegated authority to administer the Standards for a Merit System of Personnel Administration within the region, including: interpreting the Standards, determining substantial conformity and identifying deviations, advising and assisting State and local officials, reviewing administration and determining compliance. Hampton letter, supra note 472.

[500] Interview with Allan Heuerman, Associate Director, Grants Administration Division, Bureau of Intergovernmental Personnel Programs, CSC, June 13, 1974.

[501] Regardless of size each region has at least one specialist in Merit System Standards and one specialist in IPA grant programs. The larger regions usually have one BIPP representative per State who is responsible for monitoring all of the Commission's IPA related functions in the State. Among the responsibilities of these staff members are civil rights compliance activities.

IPPD REGIONAL STAFFS-PROFESSIONAL EMPLOYEES [502]

Atlanta	15
Boston	17
Chicago	42
Dallas	27
Denver	8
New York	13
Philadelphia	16
Seattle	13
San Francisco	19
St. Louis	13
Total	183

BIPP has no full time civil rights specialists either in the central office or in the regions.[503] A CSC official stated that there are central and regional office BIPP staff who spend more than half of their time on civil rights.[504] No data are kept, however, which would indicate how many employees are in this category. Nationally, BIPP estimated that it expended 33.2 percent of the salary and expenses section of its budget for equal employment opportunity purposes during fiscal year 1974.[505]

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[502] This was the regional office staffing pattern as of June 30, 1974. Robertson letter, supra note 483.

[503] CSC recently informed this Commission that for approximately two years it had a full time person in BIPP developing policy and programs in conjunction with its equal employment opportunity efforts with State and local governments. For program operations purposes CSC feels that equal employment opportunity is part of every professional staff person's job. Hampton letter, supra note 472.

[504] This official estimated that he personally spent as much as 85 percent of his time on equal employment opportunity related matters. Telephone interview with James Hellings, Special Assistant to the Director, Bureau of Intergovernmental Personnel Programs, CSC, Jan. 7, 1975.

The IPP Chief in San Francisco estimated that at least 50 percent of his staff's time was spent on equal employment opportunity matters. He stated that each State in the region has a BIPP staff person assigned to it who specializes in affirmative action plans and that these staff members spend more than half of their time on affirmative action planning.[506] The IPP Chief in Boston estimated that between 40 and 50 percent of his staff's time was spent on equal employment opportunity related matters.[507]

All of these estimates are based on the fact that BIPP officials believe that most actions they take to improve the personnel administration of State and local governments have equal employment opportunity implications whether these actions directly relate to civil rights, e.g., affirmative action planning or conducting compliance reviews, or even if they are only indirectly related, e.g., reviewing classification systems, evaluating employee-management relations, providing technical assistance, or administering the IPA grant program.[508] No other Federal agency computes civil rights staff time on this basis. Even the Civil Service Commission itself, when reporting on the administration of the Federal Equal Employment Opportunity Program, notes the specific personnel who devote the major portion of their time to equal employment opportunity, but does not attempt to confuse matters by asserting that all CSC employees engage in some civil rights related activity, although, as is the case with BIPP, changes in personnel systems have some long range effect on the employment status of minorities and women. An across-the-board change in program administration instituted by the officials of any agency which has an effect on all of those touched by the program should not be considered a civil rights activity, especially since the impact on minorities and women may not necessarily be an affirmative one. Such a time computation practice tends to blur the agency's ability to realistically evaluate its need for specialized civil rights staff.

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[505] Id. BIPP has allocated 29.5 and 32.3 percent of the salary and expenses section of its budget for equal employment opportunity for fiscal years 1975 and 1976 respectively. Id.

[506] Telephone interview with Joseph Rosati, Chief, Intergovernmental Personnel Programs Division, San Francisco Region, CSC, Jan. 7, 1975.

[507] Letter from Robert O'Hare, Chief, Intergovernmental Personnel Programs Division, Boston Region, CSC, to James Morris, Equal Opportunity Specialist, U.S. Commission on Civil Rights, Jan. 8, 1975.

[508] CSC contends that it regards work which is related to removal of artificial barriers to employment of minorities, women, and the disadvantaged as EEO-related. It stated that only where there is a substantial, direct relationship between the activity and equal employment opportunity does it regard the time spent as EEO-related. Hampton letter, supra note 472.

IV. Compliance Program

A. Merit System Standards

1. Rules and Regulations

The Merit System Standards include a section on equal employment opportunity.[509] This section is a broad policy statement prohibiting discrimination and providing for affirmative action and appeals procedures in cases of alleged discrimination.[510] As such it requires formal interpretative and explanatory language in order to become more than a philosophical declaration.[511]

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[509] 45 C.F.R. § 70.4.

[510] Section 70.4 of the Merit System Standards reads as follows:

> Equal employment opportunity will be assured in the State system and affirmative action provided in its administration. Discrimination against any person in recruitment, examination, appointment, training, promotion, retention, discipline or any other aspect of personnel administration because of political or religious opinions or affiliations or because of race, national origin, or other nonmerit factors will be prohibited. Discrimination on the basis of age or sex or physical disability will be prohibited except where specific age, sex, or physical requirements constitute a bona fide occupational qualification necessary to proper and efficient administration. The regulations will include provisions for appeals in cases of alleged discrimination to an impartial body whose determination shall be binding upon a finding of discrimination.

In August 1974, three years after it was assigned administrative responsibility for the Merit System Standards, CSC published regulations for administering the Merit System Standards.[512] These regulations are procedural in nature and relate to the evaluation of State and local personnel operations for compliance with the Merit System Standards;[513] the maintenance by State and local governments of personnel records necessary for the proper administration of a merit system;[514] and procedures for resolving issues of noncompliance with the Merit System Standards.[515]

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[511] CSC disagrees with our characterization of the Merit System Standards civil rights section as being a broad policy statment and a philosophical declaration. It states that the section has:

> in fact, firm requirements which have become operational as statutes, ordinances, charters, and personnel rules and regulations. The language does not notably differ from other sections of the Standards.... Knowledgeable personnel administrators are able to translate the requirements of the Standards into operating rules and procedures reflecting the diversity that State and local governments have in designing, executing, and managing their own personnel systems with technical assistance provided by the Commission's field staff. Hampton letter, supra note 472.

[512] 5 C.F.R. Part 900, Subpart F. CSC points out that the Standards themselves are regulations and that the August 1974 regulations were merely intended to formalize and improve procedural arrangements covered in earlier guidance materials and interagency agreements. Hampton letter, supra note 472.

[513] 5 C.F.R. § 900.605.

[514] 5 C.F.R. § 900.606.

[515] 5 C.F.R. § 900.607.

The regulations require CSC to conduct onsite compliance reviews of State merit system agencies[516] and Federal grant-aided agencies.[517] They do not, however, require that any specific percentage of agencies subject to the Merit System Standards be reviewed, nor do they define what consitutes a compliance review.[518]

CSC's regulations require affirmative action plans to be adopted and kept as part of the personnel records State and local governments are to maintain. They do not specify, however, what the plans should contain or designate a format for the plans.[519]

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516. State merit system agencies include a State Civil Service Commission, Personnel Department, Merit System Council or other similar personnel agencies providing personnel services to State and/or local agencies.

517. Federal grant-aided State agencies are State government agencies administering a grant-in-aid or other federally-assisted program under a law or regulation specifically requiring the establishment and maintenance of personnel standards on a merit basis.

518. CSC indicates that none of its program regulations contain detailed work plans which change yearly since new needs and problems arise periodically. It notes that BIPP provides instructions to the field staff on this subject. Likewise, CSC contends that although the regulations do not define the elements of a compliance review, BIPP has issued detailed field instructions on this matter. Hampton letter, supra note 472.

519. For a discussion of CSC policy issuances pursuant to these regulations, see pp. 169-76 infra. CSC has recently written that it has consistently maintained that an affirmative action program should encompass all elements of personnel management policy and practice and that plans should contain action items designed to eliminate identified equal employment problems. CSC states that it does not designate a specific format for plans because the IPA requires that State and local governments be allowed diversity in the details of their personnel system operations. Hampton letter, supra note 472.

Moreover, CSC does not approve or disapprove the affirmative action plans.[520] The plans are simply maintained by the State agencies and are looked at by IPPD staff during the course of reviews. This appears to be an inadequate procedure, since CSC's experience with the Federal equal employment opportunity program demonstrated that where plans are required but are not subject to prior approval or rejection, the plans tend to be inadequate.[521]

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520. Letter from Robert O'Hare, Chief, IPPD, Boston Regional Office, BIPP, CSC, to Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Oct. 30, 1973. Telephone interview with Morris Brooks, Chief, IPPD, Dallas Region, CSC, Nov. 26, 1974.

CSC acknowledges that it does not formally approve State and local affirmative action plans but states that it makes known to State and local agencies when their plans are deficient and urges improvement and provides specific recommendations. It sees its role as reviewing and providing technical assistance. Hampton letter, supra note 472.

521. Prior to the enactment of the Equal Employment Opportunity Act of 1972, CSC acting under its Executive order authority required Federal agencies to adopt affirmative action plans but it did not approve or disapprove them. When Congress, in the Act, required CSC to begin accepting or rejecting the plans, CSC found that a large number of agency submittals were inadequate and attributed this to the fact that the agencies' plans had not been under prior CSC scrutiny. See Chapter 1, supra.

CSC has recently written that:

> The comparison between CSC practice with Federal agencies and with State and local governments overlooks two important differences. First, at the Federal level, the Civil Service Commission is dealing with one personnel system and is in a position to determine what can legally and properly be done by agencies subject to that system. At the State and local level, we deal with a multitude of systems with diverse provisions. The task of determining, prior to approval, whether each affirmative action plan represented an acceptable level of effort in the context of the jurisdiction's system would be so large that affirmative action would be impeded by our review. Secondly, Section 3 of the IPA requires the Civil Service Commission "to encourage innovation and allow for diversity on the part of State and local governments in the design, execution and management of their own systems of personnel administration." (emphasis supplied) Hampton letter, supra note 472.

The compliance procedures contained in the Merit System Standards regulations require that where there is a lack of substantial conformity with the Merit Standards which cannot be resolved by negotiation, CSC must notify Federal grantor agencies of its finding of noncompliance and make a recommendation that grant termination proceedings be initiated.[522] Even in this case the regulations are not clear, since the term "substantial conformity" is not defined. A literal reading of the term gives the impression there are forms of discrimination which may not be found by CSC staff to be sufficiently "substantial" for CSC to recommend fund termination. While this standard of noncompliance may be deemed appropriate for some type of Merit Standards violations, it is not entirely inappropriate to apply to civil rights violations,[523] but it breaches the constitutional mandate that Federal funds not be used to support discrimination. Neither Title VI nor any other civil rights law provides the latitude to enforcing officials to decide not to take enforcement action when only a few people suffer discrimination or when a discriminatory act is not considered to be of major proportions.

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[522] 5 C.F.R. § 900.607(c).

[523] CSC recently informed this Commission that neither the concept of "substantial conformity" nor its application make any allowance for discrimination. It states that the term referred to a State's "plan" for complying with the Standards and that, while there might be differences among States in terms of matters such as the number of positions not covered by the State's merit system, each State's plan had to assure equal employment opportunity without provision for discrimination of any kind. Hampton letter, supra note 472.

2. Guidelines

Among the publications issued by CSC's Bureau of Intergovernmental Personnel Programs to assist State and local governments in complying with the equal employment opportunity requirements of the Merit System Standards,[524] two are of greatest importance. One of these booklets is intended to help State and local governments develop affirmative action programs. It was issued in November 1972 and is entitled, Equal Employment Opportunity in State and Local Governments: A Guide For Affirmative Action. This publication is essentially the same as a document issued by HEW in 1970.[525] CSC reworded HEW's publication and updated it by including references to women and sex discrimination. The booklet makes reference to the fact that State and local governments were made subject to the provisions of the Civil Rights Act of 1964 by the enactment of the Equal Employment Opportunity Act of 1972. It fails, however, to mention that the provisions of the 1972 Act are enforced by the Equal Employment Opportunity Commission and the Department of Justice; or that EEOC has developed

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524. During the four years since passage of the IPA, BIPP has issued 24 publications of varying length and depth concerning equal employment opportunity and related matters.

525. The original pamphlet, entitled, An Equal Opportunity Program for State and Local Government Employment, was published in July 1970 by HEW's Office of State Merit Systems.

comprehensive guidelines pertaining to all aspects of employment discrimination.[526]

The revised booklet does not provide adequate guidance to State and local government agencies attempting to correct problems of discrimination against minorities and women. The pamphlet treats the development of affirmative action programs in broad, general terms.[527] It does not clearly require State and local governments developing affirmative action plans to conduct utilization analyses to determine in which occupations, if any, minorities and women are being underutilized. Such an analysis is the foundation on which affirmative action plans are based. A utilization analysis is required by the Department of Labor's Office of Federal Contract Compliance (OFCC)[528] to be included in the affirmative action plans of nonconstruction contractors.[529] Absent a comprehensive utilization analysis there is no reason to believe that employers can develop effective affirmative action plans or that there will be any degree of uniformity in the plans developed.

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[526] CSC has developed a booklet listing court decisions on equal employment opportunity including a number of cases concerning personnel administration in State and local governments. The booklet summarizes the facts in each case and the court's holdings. It does not state, however, that State and local governments are bound by the courts' holdings. U.S. Civil Service Commission, Equal Employment Opportunity Court Cases (March 1974). CSC has stated that since this is an area in which judicial opinion is evolving and since courts have not consistently taken the same approach to similar fact circumstances, it would be neither helpful nor appropriate for it to make the statement suggested in the footnote. Hampton letter, *supra* note 472.

[527] CSC has stated that the *Guide* was designed to provide suggestions for development of affirmative action plans by providing an extensive, but not exhaustive, survey of the types of actions needed for a results-oriented program, in part because it was intended to be used by numerous State and local governments with widely diverse problems and needs. CSC also notes that because of the IPA's emphasis on local innovation and diversity the booklet is not meant to require any of the actions described. Hampton letter, *supra* note 472.

The pamphlet speaks about reviewing employment data on minorities and women. This, of course, is one of the first steps to be taken in conducting a utilization analysis. The pamphlet's treatment of this subject is too general to help State and local governments conduct meaningful utilization analyses. It does not, for example, specify that the employment data be collected by individual job titles rather than job groupings. It does not require that data be cross classified by race, ethnicity, and sex.[530] OFCC, by comparison, requires non-construction con-

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528. See Chapter 3 _infra_ of this report on the Office of Federal Contract Compliance.

529. 41 C.F.R. Part 60-2 also known as Revised Order Number 4. CSC contends that its role is quite different from that of OFCC in that OFCC is a civil rights enforcement agency whereas it is supposed to help State and local governments incorporate equal employment into their systems. It states "Real progress in equal employment opportunity in State and local governments will result from those governments coming to grips with their own problems, not from their following a detailed Federal checklist." It concluded that it is continually seeking to improve its program and although it had reviewed OFCC materials previously it would review the OFCC materials cited to see if they can be applied to the CSC program. Hampton letter, _supra_ note 472.

530. CSC believes that a utilization analysis reported by individual job titles may be appropriate for contractors with relatively simple job class structures, but in most State and local governments, utilization analysis reports would have to cover hundreds of job titles, resulting in a paperwork burden not materially contributing to program results. CSC also states that the yearly EEO-4 reporting form addresses this data collection question. _Id_.

tractors to furnish a listing of all the contractor's job titles appearing in collective bargaining agreements or payroll records. This listing is to include the wage rates for the jobs and the number of incumbents in each position cross classified by race, ethnicity, and sex.[531] In addition, OFCC, but not CSC, requires that employers analyze their hiring, promotion, and transfer practices for the preceding year[532] as well as the number and race, ethnicity, and sex of all job applicants.[533] The purpose of having contractors analyze this data yearly is to assess their progress in achieving affirmative action plan objectives on an annual basis. OFCC requires that contractors reevaluate their plans' goals and objectives on an annual basis.[534] CSC does not require that affirmative action plans be developed for a specific time period.[535] In its Guide CSC states that the goals should be updated,[536] but it fails to establish precise time periods

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531. 41 C.F.R. § 60-2.11(a).

532. 41 C.F.R. §§ 60-1.40(b)(2)(3).

533. 41 C.F.R. § 60-2.23(a)(2).

534. 41 C.F.R. §§ 60.1.40(b)(2)(3).

535. Interview with Douglas McIntyre, Associate Director, Personnel Management Assistance Division, BIPP, CSC, June 25, 1974.

536. The Guide states:

> /G/oals should be periodically re-evaluated and updated based on the needs of the program and changes in the work force.

U.S. Civil Service Commission, Equal Employment Opportunity in State and Local Governments - A Guide For Affirmative Action v (November 1972).

CSC contends that it did not specify precise time periods during which goals should be reviewed and updated because these time frames would vary depending on the situation and also because it believes that action plans should be continuously updated. Hampton letter, supra note 472.

during which the goals should be revised and updated. Without such time limits affirmative action plans are likely to be ineffectual pieces of paper.

CSC has also provided inadequate guidance concerning use of numerical goals and timetables by State and local government agencies in their affirmative action plans. A 1971 CSC issuance on this subject stated:

> Employment goals should be established in problem areas where the need for progress is recognized and where they will contribute to progress. [537]

In its 1972 Guide for Affirmative Action CSC endorsed the use of goals and timetables in somewhat stronger terms,[538] but it does not appear to have required their use in all situations where an underutilization is found.[539]

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[537] Memorandum from Edward A. Dunton, Deputy Executive Director, CSC, to Regional Directors, CSC, Oct. 4, 1971.

[538] The Guide states:

> One of the first steps to be included in every plan for implementation must be to assess existing situations to determine what needs to be done. This should be followed by the development of realistic goals with specific outlines of necessary action to achieve them. The establishment of such goals, with accompanying timetables, is a useful management concept which will contribute to the resolution of equal employment opportunity problems. Goals may be both qualitative and quantitative.

U.S. Civil Service Commission, Equal Employment Opportunity in State and Local Governments - A Guide For Affirmative Action v (November 1972).

[539] CSC has stated that:

> The Guide does not require use of numerical goals and timetables in all situations where underutilization is found because the booklet is a technical assistance publication, not a program regulation, and does not establish any requirements. Hampton letter, supra note 472.

As a result of CSC's lack of specificity on this important point, individual regions differ on whether State and local agencies should be required to develop goals and timetables. The IPPD chief in Dallas stated he could not require goals and timetables in the affirmative action plans of State and local governments.[540] The IPPD chief in Boston stated that the Boston IPPD does not believe in goals and timetables.[541] The IPPD chief in Atlanta, however, stated that he could not envision a meaningful affirmative action plan without goals and timetables and he would have problems with an affirmative action plan that did not include them.[542] Similarly, the IPPD chief in San Francisco said he is informing the local juridictions in his region that affirmative action plans without goals and timetables are not meaningful.[543]

CSC's equivocation on the use of goals and timetables wherever an underutilization of minorities and/or women exists is in marked contrast to the clear instructions contained in OFCC's Revised Order Number 4 for non-construction government contractors. Among its other provisions, this document requires that where deficiencies are found to exist in the contractors' work forces, written numerical goals and timetables must be established.[544] There appears to be no compelling justification which would permit the application of a lesser standard of compliance to State and local jurisdictions than that applied to Federal contractors.[545]

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[540] Brooks telephone interview, *supra* note 520.

[541] Interview with Robert O'Hare, Chief, IPPD, Boston Region, CSC, Aug. 27, 1973. CSC notes that Mr. O'Hare categorically denies making the statement attributed to him. Hampton letter, *supra* note 472.

[542] Telephone interview with George Murphy, Chief, IPPD, Atlanta Region, CSC, Nov. 27, 1974.

[543] Telephone interview with Joseph Rosati, Chief, IPPD, San Francisco Region, CSC, Nov. 27, 1974. CSC stated that it is not suprised that its regional staff have different experiences with regard to the use of goals and timetables and attributes that to the considerable operating discretion it gives to its regional units. Hampton letter, *supra* note 472.

In January 1974, CSC's Bureau of Intergovernmental Personnel Programs issued Guidelines for Qualitative Evaluations of Personnel Operations in State and Local Governments. This booklet, designed for State and local officials to use in conducting self-evaluation reviews of their personnel operations, consists of twenty pages of questions on various aspects of personnel administration. The section on equal employment opportunity consists of three pages of questions under four headings: legal basis, policy commitment, and emphasis; problem identification; problem solution through affirmative action; and reviewing program effectiveness.

The booklet is inadequate for assessing an agency's equal employment opportunity program. It poses questions to be considered, but it does not provide any answers to those questions; nor does it contain any instructions on what action should be taken if responses to the questions indicate noncompliance with equal employment opportunity regulations. The questions

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544. 41 C.F.R. § 60-2.12(h). In those situations where deficiencies exist and a goal is not established the contractor must specifically analyze all of the factors involved in making a utilization analysis and state in the affirmative action program the reason for the absence of the goal. 41 C.F.R. § 60-2.12(j).

545. CSC contends that "wherever equal employment opportunity problems or deficiencies are found to exist in the work force of a State or local jurisdiction, goals and timetables would be recommended if they could make a useful contribution to remedying the problem or deficiency.... However, we do not call for goals and timetables simply for the sake of having goals and timetables." Hampton letter, supra note 472.

themselves are too general to pinpoint problems and in many cases are likely to generate only a limited amount of information. For example, two of the questions are:

> Is there an active affirmative action recruitment program?
>
> Are there extraneous or external factors, such as court and/or appeal decisions, historical practices, and negotiated agreements, influencing the affirmative action program? [546]

The booklet might have been of more assistance if it contained additional follow up questions such as: what recruitment methods are used?; are minority and female organizations used as recruitment sources? list all such sources; list all extraneous factors and indicate the manner in which these factors affect the affirmative action program; in the case of court decisions, what are the court's findings and how are they being incorporated into the affirmative action program?; in the case of negotiated agreements, what are the provisions of the agreements, who are the parties to the agreement, when and under what circumstances were they developed? State and local government officials, evaluating the civil rights implications of their personnel operations for, in many instances, the first time, require more detailed, comprehensive guidelines to assist them than CSC has provided.[547]

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[546] U.S. Civil Service Commission, Guidelines for Qualitative Evaluations of Personnel Operations in State and Local Governments 8 (January 1974).

[547] CSC has indicated that although it believes it is inappropriate to turn the Guidelines into a set of detailed requirements, it recognizes that the booklet can be improved and will review the suggestions of this Commission. It also notes that its evaluators are not simply to follow the Guidelines, but are to phrase their questions in an open ended manner and provide their own followup questions. Hampton letter, supra note 472.

Broad statements of policy on affirmative action programs are not calculated to bring about major changes in the shortest period of time. Wherever statements are subject to varying interpretations, many employers will choose interpretations which involve the least change. The roots of discrimination against minorities and women in public service are deep and can only effectively be destroyed by strong, positive, and consistent action by the appropriate authorities. Although precise guidelines are a first step in the development of an effective enforcement program, CSC has been greatly deficient in this area. Its guidelines are less definitive than those developed by OFCC for private contractors. Although CSC has provided a number of publications and instructional materials to State and local governments concerning equal employment opportunity and related matters,[548] it has not issued a publication which provided public employers with examples of original, creative measures which they may utilize to overcome the underutilization of minorities and women that exists in the area of public employment. Nor has it attempted to catalogue[549] some of the innovative programs adopted by various jurisdictions.[550]

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[548] For a listing of such CSC issuances see Hampton letter, supra note 472, and Appendix A to Robertson letter, supra note 483.

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[549] In 1971 BIPP established a clearinghouse service to collect and distribute among CSC's regional offices copies of affirmative action plans and related materials developed by public jurisdictions which would be useful to other public agencies preparing affirmative action plans. Although the clearinghouse process could be of considerable assistance to State and local governments in developing meaningful affirmative action plans, BIPP has made use of the clearinghouse service only once since its inception.

In May 1972 BIPP distributed to CSC's regional offices copies of instructions for developing affirmative action plans received from CSC's San Francisco and Chicago regional offices. The information contained in these instructions was not significantly different than that contained in CSC's *Guide for Affirmative Action* which was issued six months later in November 1972. As already discussed in this report on pp. 169-75 *supra* the *Guide for Affirmative Action* is inadequate in that it fails to provide sufficient information for the development of acceptable affirmative action plans.

In addition, CSC states that regional staff were provided in 1971 with affirmative action plans of three Federal agencies (Department of Agriculture, Civil Aeronautics Board and the Agency for International Development) and minority staffing plans of two State employment security agencies (Illinois and Tennessee), and that in 1973 each region had copies of plans from States within the region. CSC regional offices were informed that they could make these materials available upon request. Hampton letter, *supra* note 472.

[550] See, for example, the program adopted by Michigan for increasing minorities and women in State employment which is discussed on pp. 202-06 *infra* and Chapter 1 *supra*.

3. Test Validation

The Bureau of Intergovernmental Personnel Programs has not developed testing or employee selection guidelines for State and local governments.[551] Such guidelines are crucial to any effective equal employment opportunity enforcement program, since a great number of jurisdictions utilize unvalidated selection procedures which may adversely affect minorities and women.[552]

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[551] The Civil Service Commission in October 1972 adopted testing instructions for Federal employment. These instruction were not distributed to State and local governments, however. See CSC, Testing and Employee Standard Instructions, 37 Fed. Reg. 21552, Oct. 12, 1972.

[552] The Executive Director of the National Civil Service League has written:

> A 1970 National Civil Service League survey of the state of the art of civil service showed that almost no civil services had ever validated *any* selection process to determine if, in fact, there was a direct relationship between test results and job performance. In spite of little proof of validity, the written test was the most relied-on selection test. Thirty-five percent of the governments required it even for *unskilled* jobs; 88 percent used it for entry office jobs; and 65 percent used it for professional and technical workers. (Emphasis in original.)

J. Couturier, Civil Rights In Civil Service - The Winds of Change, 34 Pub. Admin. Rev. 244 (May/June 1974). See also, J. Rutstein, Project Director, National Civil Service League, Survey of Current Personnel Systems In State and Local Governments, Good Government (Spring 1971).

CSC has stated that the Couturier quotation is misleading. It contends that the quotation:

> fails to take cognizance of State and local government use of content validity and implies that there were virtually no attempts to validate at all. By concentrating on the Equal Employment Opportunity Commission testing guidelines' insistence on criterion-related validity and ignoring the fact that professional testing standards recognize the use of content validity, the quotation erroneously concludes that little validation is carried out at the State and local governmental level. Hampton letter, *supra* note 472.

BIPP has advised its regional staff that it is waiting for the issuance of the Uniform Guidelines on Employee Selection Procedures and that, in the interim, regional staff should work with, encourage, and assist State and local agencies in making sure their selection devices are job-related.[553] However, in view of the U.S. Appeals Court decision in Douglas v. Hampton[554] it does not appear necessary to issue new testing guidelines. Instead, CSC should advise State and local governments to follow EEOC's testing guidelines.[555]

In 1972 the Equal Employment Opportunity Coordinating Council (EEOCC) was established. The EEOCC is an interagency group responsible for coordinating the activities and operations of Federal agencies responsible for enforcing equal employment opportunity legislation and developing and implementing Federal equal employment opportunity policy.[556] The EEOCC is comprised of representatives from five Federal agencies: the Civil Service Commission, the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, and the Commission on Civil Rights. During the first year of its existence the EEOCC was largely inactive. In February 1973 the EEOCC began work on developing Uniform Guidelines on Employee Selection Procedures. The Council decided to use the Equal Employment Opportunity Commission's testing guidelines as a model for developing uniform guidelines applicable to State and local governments,[557] since EEOC's guidelines had been upheld by the Supreme Court.[558] As of May 1975 EEOCC's work on the testing guidelines has not produced a consensus. A major obstacle has been the reluctance of CSC to accept EEOC's testing guidelines.[559] As a result, the EEOCC has been unable to issue any uniform guidelines on the crucial issue of testing although it has been considering the matter for more than two years.

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[553] CSC Operations Memo. 150-346 (Feb. 6, 1974).

[554] Douglas v. Hampton, 338 F. Supp. 18 (D.D.C. 1972), aff'd in part, vacated in part. No. 72-1376 (D.C. Cir. Feb. 27, 1975).

[555] CSC believes that it should not be bound by EEOC's guidelines. Hampton letter, supra note 472. For an extensive discussion of the differences between EEOC and CSC employee selection procedures and CSC's position on this issue, see Chapter 1 supra.

[556] See Chapter 6 infra of this report on the Equal Employment Opportunity Coordinating Council.

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[557] See EEOCC minutes of Feb. 8, 1973.

[558] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[559] CSC states that it could not responsibly agree to a set of selection guidelines such as EEOC's which deny employers access to professionally accepted methods of developing and assuring job-relatedness. Hampton letter, supra note 472. See also, Chapter 1 supra and 6 infra.

B. Data Collection

BIPP collected data, cross classified by race, ethnicity, and sex, on State and local government employees covered by the Merit System Standards from 1970 through 1972.[560] In 1973 BIPP ceased collecting this data under an arrangement with EEOC, which was collecting racial, ethnic, and sex data on State and local employees for the first time.[561]

Under this arrangement BIPP's regional personnel receive data printouts from EEOC by eight occupational groupings in health, welfare, and employment security agencies. CSC had requested that it receive data for all agencies subject to the Merit System Standards, and although EEOC collected data on all State agencies, it was reluctant to develop an extensive form which would produce printouts of small agencies such as civil defense, merit systems, and surplus property utilization program units because of the amount of time and paperwork required for State and local governments to complete such a form.[562] Thus, the data BIPP receives from EEOC's printouts on State and local government employees are not as precise as when CSC collected the data itself.

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[560] The data were collected by BIPP on form OS100 which had been developed by HEW's Office of State Merit Systems. The form listed the following job categories: executive and managerial; professional and technical; auxiliary and aide; clerical and office; and custodial and service. The form requested that employees be cross classified by sex under the following racial and ethnic designations: Negro; Oriental; American Indian; Spanish Surnamed American. The Oriental designation was to include Japanese, Chinese, Filipinos, Koreans, Polynesians and Malayans. The Spanish Surnamed American category was to include employees of Mexican, Puerto Rican, Cuban and other Latin American or Spanish origin or ancestry.

[561] The Equal Employment Opportunity Act of 1972 made State and local governments subject to the provisions of Title VII of the Civil Rights Act of 1964 and as such brought them under the jurisdiction of EEOC 42 U.S.C. §§ 2000e, *et seq.* (1972). For more on this point see Chapter 5 *infra* of this report on the Equal Employment Opportunity Commission.

Intergovernmental Personnel Programs Division staff obtain employee data on civil defense, merit systems, and surplus property units from State and local government agencies. This collection is facilitated because EEOC requires State and local government agencies to make available upon request to Federal agencies, which had previously collected the data, copies of the forms they submit to EEOC.[563]

C. Compliance Reports

The Bureau of Intergovernmental Personnel Programs does not require State and local agencies to file equal employment opportunity compliance reports. State and local agencies are encouraged but not required to conduct self-evaluations of their personnel operations.[564] They are expected, however,

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562. EEOC had forwarded a sample form it devised to CSC for comment. This form did not contain individual occupational functions for reporting personnel of civil defense, merit systems, and surplus property agencies covered by the Merit System Standards. CSC returned the form with a notation requesting individual occupational groupings for these agencies. EEOC notified CSC that personnel in small agencies such as civil defense, merit systems, and surplus property would not be broken out separately but would be recorded by the States under broader occupational groupings. Interview with Donald Hunt, Personnel Management Specialist, BIPP, CSC, Jan. 17, 1975.

563. Id.

564. Self-evaluations are qualitative evaluations conducted by State and local governments of their own personnel administration practices. They are to include an equal employment opportunity component.

CSC reports that the most effective way to bring about a change is through the self-evaluation approach and that it attempts to convince State and local agencies to undertake such evaluations pursuant to its guidelines. CSC concludes that "To require self-evaluation negates the primary expected advantage of the self-evaluation approach." Hampton letter, supra note 472.

to maintain copies of any self-evaluations conducted in their files for onsite review by IPPD staff but are not required to send copies to CSC regional offices.[565] IPPD staff may receive copies of self-evaluations by requesting them from State and local agencies.[566] Efforts to persuade State and local agencies to conduct self-evaluations have been unsuccessful in that few self-evaluations have been conducted by State agencies.[567]

BIPP requires merit system agencies[568] and grant-aided agencies[569] to submit annual report forms to IPPD staffs.[570] These forms request statistical information concerning certain aspects of the personnel administration practices of State and local agencies which BIPP believes are necessary to evaluate the practices. The forms do not cover equal employment opportunity. In the case of merit system agencies the forms call for the

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565. U.S. Civil Service Commission, FPM Supplement 150-72, Merit System Administration (Oct. 24, 1972).

566. Telephone interview with Donald E. Acree, Director, Personnel Assistance Operations, Personnel Management Assistance Division, BIPP, CSC, Jan. 17, 1975.

567. Id. Telephone interview with George Murphy, Chief, IPPD, Atlanta Region, CSC, Jan. 17, 1975. CSC recently stated that it expended a good deal of effort to persuade jurisdictions to undertake self-evaluation and believes that it has made a positive beginning. It indicates that some self-evaluations have been done in Arkansas, Missouri, Rhode Island, Vermont, California, Oregon, Delaware, and Virginia. Hampton letter, supra note 472.

568. Grant-aided agencies are defined at note 517 supra.

569. Merit system agencies are defined at note 516 supra.

570. U.S. Civil Service Commission Form 1128, Review of Personnel Operations - Merit System Agency, Form 1129, Review of Personnel Operations - Grant-Aided Agency.

recording of the number of employment applications received and the types and numbers of selection devices utilized.[571] For grant-aided agencies a statistical record of the number of persons hired and the number of personnel actions processed during the prior year is required.[572] None of these data are broken down by race, ethnicity, or sex. If such data were collected, they would provide CSC with additional information on which to make a professional judgement as to the compliance status of agencies subject to the Merit System Standards and would be invaluable in scheduling compliance reviews and technical assistance visits.[573]

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571. Selection devices include: ratings of training and experience, written tests, performance tests, and oral tests.

572. Personnel actions include: resignations, dismissals, retirements, transfers, and reemployments.

573. CSC recently informed this Commission that it used to collect this type of data but discontinued doing so in favor of using a joint form with EEOC. It states that to do as we suggest would require the initiation of a separate data collection system which would place unduly burdensome duplicative reporting requirements on State and local governments. Hampton letter, supra note 472. CSC's conclusion is incorrect since the data it would request would be supplemental to the data collected on the EEOC form and thus, there would be no duplicative requirements.

D. Compliance Reviews

Every three years IPPD staff are required to conduct at least one comprehensive detailed review of the personnel operations of each State merit system agency and grant-aided agency within their jurisdiction. These reviews, called qualitative evaluations,[574] cover all aspects of personnel administration including equal employment opportunity. In fiscal year 1974 BIPP reported that IPPD staffs conducted 502 qualitative evaluations of the more than 3,000 State and local merit system and grant-aided agencies covered by the Merit System Standards.[575]

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[574] CSC uses the term qualitative evaluation to refer to what other Federal agencies call compliance reviews.

[575] Letter from Donald E. Acree, Director, Personnel Assistance Operations, Personnel Management Assistance Division, BIPP, CSC, to James Morris, Equal Opportunity Specialist, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, Dec. 24, 1974.

CSC recently stated that the use of the figure 3,000 is misleading, that there are about 460 State merit system and grant-aided agencies subject to the Merit System Standards. In order to conduct qualitative evaluations of all such agencies each three years CSC would have to average about 150 per year and in fiscal year 1974, regions completed 149 initial evaluations and 123 follow-up evaluations of State agencies. The remainder of the 502 evaluations conducted by CSC involved local agencies. Hampton letter, *supra* note 472.

Intergovernmental Personnel Programs Division staff are also expected to make three monitoring visits per year to merit system agencies and State grant-aided agencies. In fiscal year 1974 BIPP reported the IPPD staff had made 1,449 onsite contacts to State and local merit system and grant-aided agencies.[576] Monitoring visits are made for a variety of reasons: in response to a State agency's request for technical assistance; to maintain liaison with merit system and grant-aided agencies; and to follow up on problems discovered in earlier visits. Monitoring visits frequently have dealt with equal employment opportunity-related matters. These visits may be quite brief, consisting of IPPD staff and State officials conferring informally, or they may be of one or more days duration, depending upon the reason for the visit.[577] Unlike qualitative evaluations, written reports are not kept on all monitoring visits. If the IPPD staff feel that the visit has been particularly noteworthy or has resulted in the resolution of a particular problem or the establishment of a special agreement between IPPD staff and State officials, then a record may be made. Most monitoring visits do not generate written reports.[578]

BIPP has not developed a detailed set of instructions on how to conduct qualitative evaluations. CSC had indicated to IPPD staff they should utilize the Guidelines For Qualitative Evaluations of Personnel Operations in State and Local Governments in making their reviews.[579] However, as indicated earlier, this document is not comprehensive.[580] For example, the publication fails to provide reviewers with adequate guidance for evaluating the equal employment aspects of such personnel practices as maternity leave benefits and the appropriateness of specific job requirements, such as those setting minimum education, height, and weight standards. In addition, although BIPP requires State and local agencies subject to the Merit System Standards to maintain written affirmative action plans, the guidelines do not specify what these plans should contain. Consequently, there is no uniform policy for IPPD staff to follow in determining whether affirmative action plans of State and local agencies are adequate and IPPD staff are left largely to their own judgment in reviewing affirmative action plans.

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[576] Acree letter, supra note 575.

[577] Telephone conversation with Donald E. Acree, Director, Personnel Assistance Operations, Personnel Management Assistance Division, BIPP, CSC, Dec. 30, 1974.

[578] Acree Jan. 17, 1975 telephone interview, supra note 5[illegible]. Murphy Jan. 17, 1975 telephone interview, supra note 567.

In contrast to CSC's failure to develop specific guidelines for compliance reviews, the Department of Labor's Office of Federal Contract Compliance has issued to its compliance agencies detailed instructions known as Revised Order Number 14 for conducting compliance reviews.[581] Moreover, OFCC's instructions speak to points in compliance reviews which CSC's guidelines do not address, such as reviewing seniority systems for discriminatory impact and analyzing promotion rates to determine if a disparate promotion rate exists for minorities and women. Even where CSC and OFCC treat the same subject such as affirmative action plans, CSC's treatment in

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579. U.S. Civil Service Commission, Federal Personnel Manual Supplement 150-72, Merit System Administration (Feb. 6, 1974).

580. See p. 175 supra for a discussion of the Guidelines.

581. 41 C.F.R. § 60-60.1, et seq. (1974). See Chapter 3 infra of this report on the Office of Federal Contract Compliance.

its guidelines of this subject is superficial compared with the detailed information OFCC's Revised Order Number 14 requires compliance personnel to ascertain.[582] For example, contract compliance staff are to determine the job title by department in which the minority or female proportions either do not generally reflect the minority or female composition of the establishment's labor force or the labor force of the area within which it is reasonable to expect persons to commute, and to review sample data on applicant flow and hiring rates to determine whether there is a lower rate of job offers to and hiring of minorities or women with regard to those positions where an underutilization exists.[583]

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[582] CSC recently informed this Commission that it believed that its authority under the IPA, especially those provisions which concern the application of Merit Standards in grant-in-aid programs, is not synonymous with the authority of the OFCC in connection with contracts entered into by Federal agencies. It further stated:

> We seriously question the efficacy of the national government applying the sanction of withdrawing grants-in-aid to State governments in the social services programs, e.g., public welfare, public health, and employment security. The primary effect of this approach would be the denial of benefits to those for whom the programs were enacted. We believe that the methods and approaches followed by the USCSC and the concerned grant-administering agencies, in applying the Merit Standards authority of the IPA, provide for continuation of those benefits while progress in EEO is achieved....We can say, on the basis of the available staffing statistics and other information developed by the IPPD staffs through the evaluation program, that the grant-aided State agencies covered by the Merit Standards are leading, not trailing, other State agencies in achieving national EEO goals. Hampton letter, supra note 472.

CSC's failure to develop adequate compliance review guidelines was compounded by its delinquent implementation of a full scale compliance review program.[584] Although CSC assumed responsibility for the Merit System Standards on March 7, 1971, qualitative evaluations were not conducted in significant numbers prior to January 1973, more than 21 months after the effective date of the Intergovernmental Personnel Act.[585]

This delay was particularly indefensible with regard to the State of

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583. Other matters not specifically covered by CSC guidelines, but required by Revised Order Number 14, include that: in jobs where underutilization exists, a determination is to be made whether the contractor's affirmative action goals are sufficient and whether the contractor's past performance in meeting these goals has been adequate, and where a review of sample data on applicant flow and hiring rates demonstrates a lower rate of job offers to and hiring of minorities or women, an analysis must be obtained from the contractor showing the reasons for the rejection of all the applicants in the sample data. 39 Fed. Reg. 25655 (1974).

584. CSC has recently stated that shortly after the transfer of responsibility for Merit System Standards to it from HEW, it undertook many new initiatives and added staff in the central office and in the regions. It further noted that it issued evaluation guidelines in 1972 and reissued them in 1973 after they had been reviewed by a intergovernmental task force. Lastly, CSC wrote "The 'Qualitative evaluation' effort simply initiated a more comprehensive evaluation program, including a more formalized reporting system." Hampton letter, supra note 472.

585. Number of Qualitative Evaluations Conducted Per Calendar Year*

Region	1972	1973	1974
Atlanta	0	76	61
Boston	0	20	40
Chicago	0	31	44
Dallas	0	2	45
Denver	1	1	33
New York	2	9	25
Philadelphia	0	6	21
St. Louis	3	31	14
San Francisco	3	12	14
Seattle	0	8	20
TOTAL	9	196	317

* Information obtained from copies of qualitative evaluations on file in BIPP's central office.

Alabama. That jurisdiction had refused in 1966 to adopt nondiscriminatory provisions in its personnel rules as required by the Merit System Standards. HEW initiated fund termination procedures; but, prior to the actual termination of the funds, a legal action was brought by the Department of Justice against substantially all Alabama State agencies. In July 1970, a Federal district court enjoined the State from further discriminatory employment practices in the areas of certification of eligibles and specified appointment procedures and required the State to publicly proclaim that it would appoint and employ persons on an equal opportunity basis.[586] BIPP's Atlanta IPPD staff, however, did not conduct a qualitative evaluation of any Alabama State agencies until 1973,[587] and those reviews found broad areas of noncompliance.[588]

CSC's inadequate guidelines have contributed to deficiencies in qualitative evaluations conducted by IPPD staff.[589] For example, the reviews frequently failed to address all substantive matters impacting on equal employment opportunity. Almost without exception the review reports covered the matter of selection devices by merely stating that a State or local agency's written employment tests were job-related. The matter of test validation was often not even referred to or if it was mentioned there was rarely any discussion as to how or by whom the validation was accomplished.[590]

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[586] United States v. Frazer, 317 F. Supp. 1079 (N.D. Ala. 1970).

[587] CSC indicates that Alabama was one of the first States it reviewed onsite once it set up its formal qualitative evaluation program. Hampton letter, supra note 472.

[588] For a discussion of these reviews, see pp. 192-96 infra.

[589] Staff from this Commission reviewed approximately 50 qualitative evaluations conducted by IPPD staff between November 1972 and June 1974.

Further, in at least two evaluations conducted in areas with heavy concentrations of persons of Spanish speaking background, any reference to the special problems of this minority group were omitted. Job requirements which might have a disparate adverse impact on members of that group, such as the necessity for applicants to speak English and height and weight restrictions, were not considered in these two reviews.[591]

Another deficiency of the reviews was that the equal employment opportunity recommendations made by IPPD staff were often weak or too general to effectively secure prompt compliance. In January 1973 the Atlanta IPPD staff reviewed the Alabama Personnel Department, the State's central merit system agency. Under the Merit System Standards the State central merit system agency can be extremely important, since it provides a variety of personnel services to State and local agencies and is responsible for statewide personnel policy. The qualitative evaluation of the Alabama Department of Personnel noted that the State had not developed an affirmative action plan or amended its personnel rules to incorporate the nondiscrimination provisions of the Merit System Standards.[592] The report also stated that although the State was obeying the court's requirement with respect to collecting racial data on its employees, it was not attempting to analyze or utilize the data.[593]

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[590] CSC stated that the qualitative evaluation of the Alabama Department of Personnel dealt with lack of documentation of job-relatedness of examinations and lack of test validation research. Hampton letter, supra note 472.

[591] Qualitative evaluations of the Coral Gables, Florida, Merit System, February 1974 and the California State Personnel Board, January 1973.

[592] See pp. 190-91 supra for a discussion of the compliance status of Alabama prior to 1973.

The equal employment opportunity recommendations made by the Atlanta IPPD staff were that the State develop an affirmative action plan and revise the State personnel rules to incorporate the nondiscrimination requirements of the Merit System Standards. The recommendations did not spell out the components of the affirmative action plan, did not establish a specific time frame in which the required actions were to be accomplished, and did not require the submission of progress reports on the State's compliance actions.[594] The Chief of the Atlanta IPPD staff said no specific equal employment followup contracts had been made concerning the review.[595]

Another example of the failure of CSC staff to provide definitive recommendations occurred in the case of the Nebraska Joint Merit System Council.[596] CSC staff found in November 1972 that the Council's affirmative

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593. Qualitative Evaluation of the Alabama Personnel Department, Jan. 15-18, 1973.

594. The transmittal letter accompanying the copy of the Qualitative Evaluation sent to the Director of the Alabama Personnel Department only requested a report from the, State within 30 days of its receipt of the review on the actions planned in accordance with the recommendations. Letter from Hammond Smith, Regional Director, Atlanta Region, CSC, to John S. Frazer, Director, Alabama Personnel Department, June 4, 1973.

595. Telephone interview with George Murphy, Chief, IPPD staff, Altanta Region, CSC, Jan. 20, 1975. CSC recently reported to this Commission that while the qualitative evaluation did not spell out the components of an affirmative action plan, these components were spelled out for the State officials and a number of equal employment opportunity guidance materials, including other affirmative action plans were provided. After receiving an inadequate reply from the State in July, in September 1973 a letter was sent to the Alabama Personnel Director restating and clarifying the recommendations made in the original report. In February 1974 the Alabama Personnel Director informed CSC of changes in the State personnel rules concerning equal employment opportunity and an affirmative action plan was implemented in May 1974. Hampton letter, supra note 472.

596. Qualitative evaluation of the Nebraska Joint Merit System Council, November 1972.

action plan lacked specificity and measurability in most of its action items and the plan's total scope was too limited. The recommendation relating to equal employment opportunity was simply that an effective affirmative action plan be developed. Again, no specifics concerning the elements of the plan were included in the recommendation, no time frame was suggested for the plan's development and implementation, and no periodic reporting system was developed.[597] Followup reviews conducted in August 1973 and June 1974[598] demonstrated that the agency still had not developed an effective affirmative action plan and continued in noncompliance with the Merit System Standards. Yet, CSC merely reiterated its earlier broad recommendation.[599]

Another instance where inadequate recommendations were made is found in a qualitative evaluation of the Alabama Department of Public Health, the largest of all Merit System agencies in the State.[600] An initial review of this agency conducted in February 1973 noted that although the agency had developed an affirmative action plan in June 1972, it had not taken any action to implement the plan because of a false assumption by the agency that it needed approval of the U.S. Public Health Service or CSC to take action under the plan.[601] The recommendations made in this review were that the plan be implemented immediately, that it contain target dates for its action items, and that the plan be posted on official bulletin boards in order to be accessible to all employees, applicants, and visitors to the agency.[602] Thus, CSC failed to indicate the nature of the target dates that it believed were acceptable and did not require that progress reports, which would show the steps taken by the State and local officials to implement these actions, be filed with its staff.

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[597] Qualitative evaluation of the Nebraska Joint Merit System Council, August 1973.

[598] Qualitative evaluation of the Nebraska Joint Merit System Council, June 1974.

[599] CSC recently informed this Commission that the single final report on the Nebraska Joint Merit System Council provided recommendations on affirmative action planning areas such as the need for a written equal employment policy, regulations to prohibit discrimination on the basis of sex, and implementation of a labor market and work force analysis system. CSC notes that some of these recommendations were adopted by mid 1974. Hampton letter, supra note 472. Although the recommendations were useful, they did not add up to the elements of a viable affirmative action plan. CSC also stated that after the 1974 review specific timeframes were required for action items in the in the affirmative action plan and that in late August 1974 the Nebraska Council reported a series of actions taken. Id.

[600] In January 1974 the Alabama Department of Public Health had a staff of 1,628 full-time employees.

In January 1974 a followup review of this agency was conducted. The findings of this review stated that:

> The plan developed in June 1972 has not been implemented nor have target dates been set for starting or completing action items. Neither the plan nor equal employment opportunity posters were on bulletin boards at the time of the followup review. 603

The equal employment opportunity recommendations were simply that the Public Health Department should immediately begin implementation of the affirmative action plan and provide the resources necessary to make the plan effective.[604] Thus, CSC's activity in this instance failed to bring

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601. Qualitative evaluation of the Alabama Department of Public Health, February 1973.

602. _Id_.

603. Qualitative evaluation of the Alabama Department of Public Health, January 1974.

604. _Id_.

about compliance. Moreover, when the Commission was faced with continuing violations of law, it did not initiate enforcement action; rather it merely repeated the same weak recommendations it had made previously.[605]

E. Complaint Investigations

BIPP officials believe that they have no enforcement authority under the IPA in individual cases of discrimination because of a specific statutory provision which states:

> Nothing in this section or in section 4722 or 4723 of this Act shall be construed to - (1) authorize any agency or official of the Federal Government to exercise any authority, direction, or control over the selection, assignment, advancement, retention, compensation, or other personnel action with respect to any individual State or local employee; ... 606

As a result, IPPD staff do not investigate complaints.

BIPP requires State and local governments to establish and maintain an appeals system in accordance with the language of the Merit System Standards. The Standards require only that:

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605. Such a procedure is not calculated to promptly and effectively secure the rights of the victims of discrimination since it is not likely to convince recalcitrant State agency officials that sanctions will be imposed for noncompliance. It may well leave the impression that compliance consists of nothing more than making minor procedural changes in their programs. In fact, CSC informed this Commission that the report of its February 1973 review of the equal opportunity action program in the Alabama Health Department called for "immediate implementation" of an affirmative action plan, but despite its "lengthy" and "vigorous" negotiations with the State agency implementation of the plan did not take place until March 1975, more than two years after the demand for immediate action by CSC. CSC stressed that eventual implementation of the plan was achieved without resort to grant termination procedures. Hampton letter, supra note 472. What CSC appears to overlook is that by allowing continuing noncompliance for two years it failed to discharge its legal and moral obligations as an enforcement agency.

606. Intergovernmental Personnel Act of 1970, 42 U.S.C. § 4728 (f)(1).

> The regulations will include provisions for appeals in cases of alleged discrimination to an impartial body whose determination shall be binding upon a finding of discrimination. 607

The only elaboration CSC has made on the broad language of the Standards consists of the questions contained in its Guidelines for Qualitative Evaluations. These questions, however, do not address such important issues as the availability of back pay in cases of violations and whether complaints may be filed by or on behalf of groups, as opposed to solely by an individual on his or her own behalf. They are concerned with the operational aspects of appeal systems, such as time limitations for processing complaints, volume of appeals processed, and whether decisions of the appeals body are are binding.

BIPP's central office does not maintain an index of complaints received nor does it require IPPD staff to do so. 608 CSC, however, requested its regional staff in April 1974 to provide a special report providing information concerning complaints filed against State merit systems with the Equal Employment Opportunity Commission. 609 This report was to include the following information:

> (1) For each State in your region, please describe the plans of State merit system officials to utilize information about the number and nature of EEOC charges and cases against State merit systems.

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607. 45 C.F.R. 8 70.4.

608. Telephone interview with Donald E. Acree, Director, Personnel Assistance Operations, Personnel Management Assistance Division, BIPP, CSC, Jan. 21, 1975.

609. CSC Operations Memo. 150-367 (Apr. 3, 1974).

(2) For each State in your region, please give an evaluation of the effectiveness of actions being taken to deal with the problems which are revealed by analysis of discrimination complaints and EEO cases.

(3) For each State, please give your assessment of the effectiveness of the State's own discrimination appeals system for public employees in resolving complaints of discrimination. [610]

The information furnished by the regions revealed a distressing situation. Five States including local jurisdictions within them were reported to have more than 250 complaints filed against them with the Equal Employment Opportunity Commission. These States were: Indiana, 958 complaints; New Mexico, 791 complaints; Michigan, 494 complaints; Wisconsin, 324 complaints; and Illinois, 253 complaints.[611] In addition, figures on the number of complaints filed were not provided for 11 States, including such key jurisdictions as Pennsylvania, Virginia, and Oklahoma. New York reported that no charges had been filed against it, yet BIPP's check of an EEOC computer printout for the period ending December 31, 1973, revealed that 125 charges had been filed against New York.[612] At least 27 States were reported as making no use of information on complaints. This includes not only such States as Alabama, Colorado, and New Jersey, with a relatively low number of complaints,[613]

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610. Id.

611. The complaint totals for Indiana, Michigan, and Illinois include complaints filed against local jurisdictions as well as the State governments. Memorandum from Joseph Robertson, Director, BIPP, CSC, to Edward A. Dunton, Deputy Executive Director, CSC, Nov. 1, 1974.

612. Id.

613. Alabama was reported as having 10 complaints; Colorado, 6 (per month); and New Jersey, only 1.

but also 3 of the 5 States with the most complaints, i.e., Indiana, Illinois, and Wisconsin.

The CSC evaluation found the appeals systems in 13 States to be of questionable value. These states included Alabama, Mississippi, Indiana, and Wisconsin.[614] IPPD staff judged the appeals system in Delaware as being poor and the systems in Kansas, Maryland,[615] and New Mexico as inadequate to meet the Merit System Standards' requirements.[616] Specifically, for example, New Mexico does not provide for appeals to an impartial body whose decision shall be binding in cases of alleged discrimination as required by the Merit System Standards.[617] This situation combinded with the large number of complaints filed against the State indicates a serious, longstanding case of noncompliance with the Merit System Standards. Yet CSC has recommended neither immediate corrective action nor that sanctions be applied against New Mexico.[618]

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[614] No evaluation was made on the effectiveness of the appeals systems in 5 States: Minnesota, Montana, New Hampshire, New Jersey, and New York.

[615] CSC recently informed this Commission that, subsequent to the November 1974 Memorandum upon which our information is based, Delaware submitted a plan which was minimally acceptable and that Kansas developed an appeals procedure which fully meets CSC standards. CSC also notes that Maryland had a disproportionately large number of minorities in all three of the major State grant aided agencies. Hampton letter, supra note 472. CSC did not provide figures on the percentages of women employed in Maryland grant-aided agencies, nor did it indicate the percentage of minorities in professional or policy making positions. Moreover, employment of minorities does not obviate the need for an impartial appeals system.

[616] Robertson memorandum, supra note 611.

[617] Id.

Further, although Indiana had an appeals system believed by CSC staff to have adequate regulations and procedures, none of the 953 complaints filed against the State went through the State's appeals system. All were filed with the State fair employment practice commission agency which, because of its workload, deferred the handling of 904 complaints to EEOC.[619] This appears to indicate that Indiana's appeals system is unknown to those who it is supposed to protect or that those persons do not hold it in high esteem. In either case the Merit Standard appeals system does not seem to be of much value in the State with the highest number of discrimination complaints.

The material collected by CSC regional officials concerning complaints indicates the existence of serious equal employment problems and possible nonconformity with the Merit System Standards in a number of States. Indeed, BIPP itself noted this in a November 1, 1974, report to CSC's Deputy

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[618] BIPP's central office has not recommended the imposition of sanctions against New Mexico nor does it have any records in its files of recommendations by CSC's Dallas regional staff to impose sanctions on New Mexico. Acree interview, supra note 608.

CSC contends that the progress made in New Mexico is an excellent demonstration of how results can be attained without terminating Federal funds. It indicates that after negotiation with State officials which began in 1973 changes have been made such that the State Human Relations Commission has become actively involved in hearing allegations of discrimination in public employment. Hampton letter, supra note 472. CSC has not stated that the present arrangement in New Mexico is fully acceptable and in view of CSC preference for the State Personnel Board to be the responsible agency in terms of the appeals system, the solution in New Mexico is questionable. Moreover, it is not clear that the findings of the State Human Rights Commission are binding on all State agencies.

[619] Robertson memorandum, supra note 611.

Executive Director. The memorandum from BIPP's Director, Joseph Robertson, stated that:

> ... there seems to be sufficient cause for concern over the adequacy of the State and local merit system appeals procedures which we have approved to satisfactorily handle complaints of discrimination as required by the Standards. 620

The Director of BIPP proposed that a memorandum which would make five major points be sent to CSC's regional offices. First, priority attention should be given to making improvements in the States whose merit system appeals provisions do not adequately meet the requirements of the Federal Merit System Standards. Second, evaluations of appeals systems should include a review of how the systems are being administered as well as the acceptability of the systems' rules and regulations. This is especially important in those jurisdictions having high numbers of complaints filed. Third, where there are a variety of appeals procedures in a single jurisdiction, the State should assure that there is adequate publicity to assure that complainants are aware of the appeals avenues open to them. Fourth, all State and local officials should be encouraged to use their knowledge of discrimination complaints to develop, analyze, and revise their affirmative action plans. Lastly, all State and local merit system agencies should be reminded of the pressing need to maintain an adequate EEO appeals capability, even if there is another appeals body in the jurisdiction. 621

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620. Id.

621. Id. It was felt that an adequate merit system appeals system would result in more informal resolutions of complaints, lessen the time required to resolve complaints, relieve the burden on some FEP agencies, and help the merit systems identify and eliminate systemic problems. Id.

As of late January 1975, no memorandum had been sent to field personnel on this matter. Moreover, the five proposed recommendations failed to adequately confront the significant problems identified by CSC regional staff. They do not spell out in detail the necessary components of an appeals system and they do not contain time frames for implementation of actions they do suggest.[622] States have been required since March 1971 to provide for appeals to an impartial body in discrimination complaints. CSC's failure to have monitored compliance with this requirement until recently has resulted in its uneven implementation by the States. Immediate compliance must be secured and the failure of any States, especially Maryland or New Mexico, to adopt promptly the CSC requirements should result in the initiation of fund termination procedures.

F. Enforcement

CSC has not recommended to grantor agencies that funds be terminated under Merit System Standards for discrimination against women or minorities.[623] It has, however, through its Chicago IPPD staff brought pressure on Federal grantor agencies to compel grant-aided agencies to agree not to utilize a policy adopted by the Michigan Civil Serive Commission to increase the number of minorities and women in Michigan State agencies.[624]

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[622] CSC recently informed this Commission that a policy memorandum to a top CSC official is supposed to be written in broad terms, that discussion details and time frames are made in regional offices. It also pointed out that it does not attempt to set forth detailed recommendations on one personnel procedure or impose time frames arbitrarily for State and local agencies because it believes in handling each situation on an individual basis, thus taking into account the diverse nature of the legal and administrative procedures of the jurisdictions with which it deals. Hampton letter, supra note 472.

[623] Telephone interview with Donald E. Acree, Director, Personnel Assistance Operations, Personnel Management Assistance Division, BIPP, CSC, Dec. 10, 1974.

Michigan had conducted a review of the composition of the work forces of its State agencies, i.e., a utilization analysis. This analysis revealed underutilization of minorities and women in most State agencies.[625] Michigan also found that its employment tests were unvalidated and had a disparate effect on minorites and women. Based on this information, the Michigan Civil Service Commission adopted a policy of expanded certification under a section of the Michigan Civil Service rules which provides for alternative methods of selection in order to achieve equal employment opportunity.[626]

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[624] In October 1974 CSC's regional director in Chicago sent a letter to HEW's Chicago regional representative requesting that he obtain assurances from HEW's grant-aided agencies that they would not utilize Michigan's expanded certification policy. His letter stated:

> At this time, rather than certifying to you that the Michigan Civil Service Commission is no longer in substantial conformity with the Standards, I believe it more constructive and expeditious to ask you to request your respective State Program Director(s) to assure you in writing that he (they) will not use the Expanded Certification Policy contrary to the Standards and other Federal requirements. As you know, a written letter of assurance can be incorporated in your grant-aided State Plan and thus enable us to conclude that it meets the Standards.

Letter from J.A. Connor, Director, Chicago Region, CSC, to R. Dale Wilson, Regional Representative, Division of Surplus Property Utilization, HEW, Oct. 2, 1974.

[625] Figures recently supplied by CSC on the number of minorities employed in the three major grant-aided agencies in Michigan (Public Health, Public Welfare, and Employment Security) show that the Negro employment percentage in two grant-aided agencies was more than two and one-half times the percent of Negroes in the total work force in the State. In the third major grant-aided agency (Public Health) the Negro employment percentage was 7.6 percent, compared with 10.0 percent Negro employment in the total work force in the State. Hampton letter, supra note 472. These figures, however, do not specify in which occupations or grade levels the minorities are employed.

[626] Michigan Civil Service Commission Rule 1.2a.

Michigan's personnel regulations provide for selection from among the top three candidates on employee certificates. The expanded certification policy permits the selecting official to choose from candidates beneath the top three under certain conditions. These conditions are that the employing agency is attempting to fill the particular position to meet the requirements of an affirmative action plan, the employment test or tests used in rating the eligibles have not been validated, and the selecting official certifies that the person selected is equally as qualified as the top three candidates. In addition, permission to select eligibles from the first half of the availability list is subject to final approval of the Michigan Civil Service Commission. Permission to select from the second half of the list must be secured in advance from the Michigan Civil Service Commission.[627]

In January 1975 the legality of Michigan's expanded certification policy was under consideration by the staff committee of the EEOCC. At a meeting of the EEOCC staff on January 13, 1975, CSC maintained that Michigan's expanded certification policy discriminates on the basis of race and sex and thus violates the Merit System Standards. CSC believes that Michigan's policy of expanded certification permits agencies to bypass qualified persons on an employment register in favor of minorities and women applicants regardless of where they are located on the certificate.[628]

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[627] Memorandum from Sidney Singer, State of Michigan Personnel Director to All Appointing Authorities, Personnel Officers, and Recognized Employee Organizations, Nov. 27, 1973.

The position of the Commission on Civil Rights, which was agreed to by the staff representatives of the other three member agencies of the EEOCC, was that Michigan's policy was prima facie valid. Where an underutilization of minorities and women exists the employer has an obligation to increase the pool of minorities and women. Michigan's actions represent an attempt consistent with Title VII to increase the pool of qualified minority and female applicants who were available for selection. In view of the findings of the utilization analysis conducted by the State and the fact that its tests are not valid as predictors of job success, it appears that the action by the State is a necessary and appropriate form of affirmative action.[629] The attempt by CSC to prohibit such a positive approach to ending employment discrimination represents a policy which is in conflict with Title VII and retards the potential for progress in State and local civil services across the Nation.

This Commission further believes that where there is an underutilization of minorities and/or women it is entirely appropriate within the context of an affirmative action plan for race, ethnicity, or sex to be one of the factors to be considered in selecting applicants.

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[628] EEOCC meeting of January 13, 1975, remarks of Irving Kator, Deputy Executive Director, CSC, and Carl Goodman, Deputy General Counsel, CSC. Connor letter, supra note 158.

[629] CSC challenged the method by which the State implemented the policy and the EEOCC staff committee requested information from representatives of the Office of the Governor of the State. As of May 1, 1975, the staff committee had not made a decision on the legality of the Michigan policy.

This consideration of such factors in the employment process was intended to redress the historic imbalance favoring white males in the job market. The preference traditionally given to the white male was to a large degree based on subjective elements which enter into the selection process. The candidate's personality, disposition, experience, and apparent judgement are but a few of the elements that always influence a selection. Under some circumstances, race, ethnicity, or sex may also be a factor which requires evaluation.[630]

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[630] A document issued by the Commission on Civil Rights on affirmative action states:

> An affirmative action plan must require some action that has not heretofore taken place. Otherwise it is useless. One of the requirements, therefore, is that in the subjective evaluations that always occur in the selection process, one factor previously excluded should now be included - a concern that a reasonable number of qualified minorities and women be hired until equity is attained.

U.S. Commission on Civil Rights, Statement on Affirmative Action For Equal Employment Opportunities 23 (February 1973). CSC states its belief that "The use of race, ethnicity or sex as a selection factor is what Congress intended to prohibit by the Civil Rights Act." Hampton letter, supra note 472.

V. Compliance Program

A. IPA Grants

1. Rules and Regulations

CSC's grant program is subject to the provisions of Title VI of the Civil Rights Act of 1964 and CSC has issued regulations implementing that congressional mandate. These regulations are similar to those issued by other Title VI agencies.

CSC's regulations, however, lack provisions banning discrimination in the selection and staffing of advisory and planning boards, councils, and commissions.[631] Yet almost all States have established IPA advisory councils or committees, the members of which are appointed by the governor. These advisory bodies recommend how IPA grant funds should be distributed and thus their deliberations have an influence over the disposition of Federal funds. It is, therefore, essential that the views of minorities and women adequately be represented.

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[631] Such a provision exists in the Title VI regulations of other Federal agencies. For example, HEW has such a provision in its regulations, 45 C.F.R. § 80.3(b)(vii) and the Title VI regulations of the Law Enforcement Assistance Administration of the Department of Justice also contain a provision banning discrimination in the selection of persons to serve on advisory and planning bodies, 28 C.F.R. § 42.104(b)(vii).

CSC recently informed this Commission that:

> Given the nature of advisory councils and the sensitivity of governors to the need for councils to be as representative as possible, the report's implication that the lack of regulations represents a problem is misleading. Although there is no actual evidence that a discrimination problem exists, we will give consideration to amending our regulations to prohibit discrimination in the selection of members of IPA Advisory Councils. Hampton letter, supra note 472.

BIPP has not even collected data on the race, ethnicity, or sex of members of advisory boards.[632] In a field directive on this subject BIPP's central office required regional staff to submit membership lists of IPA State advisory bodies but did not require any data on the racial, ethnic, or sex composition of these bodies.[633]

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632. Minority and female underrepresentation on these advisory bodies appeared to be a problem in 1973. For example, at that time the Arizona IPA planning body had 7 members, all of whom were white males. Likewise, the California IPA planning body was comprised of 21 persons, only one of whom was a minority and one other member was a woman. Interview with Joseph Rosati, Chief, IPPD, San Francisco Region, CSC, Mar. 21, 1973.

633. CSC Operations Memo. 150-169 (Sept. 22, 1972).

The regulations issued by CSC to supplement its Title VI regulations, entitled "Nondiscrimination and Equal Employment Opportunity in Federally Assisted Programs of the U.S. Civil Service Commission" /hereinafter referred to as the Equal Employment Opportunity regulations/, in addition to prohibiting discrimination on all the indices contained in Title VI, i.e., race, color, and national origin, forbid discrimination on the basis of religion, sex, and political affiliation. Moreover, while the Title VI regulations have a limited coverage of employment discrimination,[634] the CSC supplemental regulations are applicable to the employment practices of the agency administering the IPA grant program.

CSC's Title VI regulations permit persons to file discrimination complaints on their own behalf or for a specific class of persons.[635] CSC's supplemental regulations only provide for the filing of discrimination complaints by individual complainants on their own behalf.[636] This is an important difference because the limited language of the supplementary regulations does not acknowledge the possibility of class action complaints. It is BIPP's belief that the difference between the two sets of regulations on this point is not significant, since its field staff are required, in conducting compliance reviews, to look at the grantee's entire personnel system and that in this way discriminatory policies, regardless of whether they affect an individual or a class of people, would be reviewed for conformity with the equal employment opportunity regulations.[637] This premise is not borne out by the facts. In the two complaints filed with CSC involving the grant program, IPPD staff have not conducted complaint investigations or made compliance reviews of the grants involved.[638]

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[634] Title VI covers employment only in those instances where employment is a primary purpose of the assistance provided or where discrimination in employment would have an adverse impact on the services provided by the assistance program. See note 489 supra.

[635] 5 C.F.R. § 900.407(b).

[636] 5 C.F.R. § 900.509(b).

Both the Title VI regulations and the Equal Employment Opportunity regulations require recipients or State or local government agencies administering IPA grant programs to take affirmative action to eliminate discriminatory practices or the effects of such practices. Neither set of regulations requires written affirmative action plans although the Equal

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[637] Telephone interview with Ellen Russell, Grants Specialist, Grants Administration Division, BIPP, CSC, Feb. 13, 1975. CSC recently indicated that its regulations do not specifically preclude class action complaints. Hampton letter, supra note 472.

[638] For a further discussion of this point, see pp. 224-27 infra.

Employment Opportunity regulations contain a provision permitting CSC to require a written affirmative action plan from an agency or organization administering an IPA program.[639]

2. Guidelines

BIPP has developed equal employment opportunity guidelines for IPA grantees.[640] These guidelines were designed to assist IPA grant recipients to comply with the CSC regulations regarding discrimination in services and employment. They are composed of three parts. The first section of the guidelines summarizes the provisions of the regulations and discusses their relationship to Titles VI and VII of the Civil Rights Act of 1964. For example, the guidelines state that CSC will operate under Equal Employment Opportunity regulations in all cases of alleged or actual violations where CSC is the only Federal agency involved. Title VI authority will be used in cases where other Federal grantor agencies are involved and coordinated action is being taken by the Justice Department.

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[639] 5 C.F.R. § 900.506(c). CSC recently indicated that it is giving serious consideration to revising its regulations to require that all grantees with a workforce above a certain size have a written affirmative action plan. Hampton letter, supra note 472.

[640] U.S. Civil Service Commission, Guidelines for Implementation Nondiscrimination and Equal Employment Opportunity Regulations Under the Intergovernmental Personnel Act Grant Program (May 1973) [hereinafter cited as CSC Guidelines]

The second part of the guidelines describes what CSC considers the minimum features of an adequate civil rights effort by a recipient. Some of the features cited that apply to grant administration are:

> stating in all literature for public consumption (such as brochures for training courses) that discrimination on the basis of race, color, national origin, sex, religious creed, or political affiliation is prohibited in IPA-supported activities...,
>
> evaluating all personnel management projects to ensure that they do not intentionally or unintentionally result in discrimination of an individual or systemic nature,
>
> evaluating participation of women and minority group members in IPA programs involving participants.... [641]

These comments do not constitute adequate guidance to a recipient of the types of behavior which are prohibited. For example, a recipient may not be aware of the forms of action which constitute "unintentional discrimination" and, without further specific instructions, may find it extremely difficult to come into voluntary compliance.

With regard to the employment practices of agencies administering an IPA grant, the guidelines simply state that many agencies will already be following an affirmative action plan, and those agencies that do not already have such plans should look at CSC's booklet entitled "An Equal Opportunity Program for State and Local Government Employment" for guidance on setting up an affirmative action program.[642] While CSC has at least provided a

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641. CSC Guidelines at 5.

642. Id.

booklet with regard to affirmative action in employment, as opposed to the absence of any publication regarding discrimination in grants administration, that booklet is not sufficiently specific. As indicated earlier in this report,[643] it does not clearly require State and local governments developing affirmative action plans to conduct utilization analyses.[644] The failure of CSC unequivocally to require State and local agencies subject to its affirmative action requirements to conduct utilization analyses is extremely critical.[645] If recipients do not conduct an analysis of their utilization of minorities and women to determine whether any problems exist, CSC would be unable to determine if the situation was sufficiently serious to require the development of a written affirmative action plan unless it conducted a compliance review. Effective administration of a civil rights program and good basic management principles dictate that recipients should undertake preliminary analyses on their own; and, if outstanding problems are discovered, the recipients should take prompt corrective action.

The third part of the guidelines explains the procedures CSC will follow to ascertain and effect compliance by grantees with the Equal Employment Opportunity regulations. This part includes brief descriptions of the preapplication grant consultation, compliance review, and

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643. For a discussion of the booklet's deficiencies, see pp. 169-74 supra.

644. Another example of the booklet's lack of specificity involves the collection of employment data. Although the booklet speaks about reviewing employment data on minorities and women it does not specify that employment data be collected by individual job titles or cross classified by race, ethnicity, and sex.

645. CSC has stated that it does not agree "that the absence of a 'requirement' in this regard is 'extremely critical' since this lack of a specific requirement does not mean that the utilization analyses are not performed or that CSC or State and local governments do not encourage the use of this tool." In addition, CSC noted that it would specifically discuss the need for and usefulness of a utilization analysis in revised guidelines. Hampton letter, supra note 472.

complaint investigation processes.[646]

BIPP has also developed a compliance guide[647] and an equal employment opportunity checklist for regional personnel to use in making equal employment opportunity reviews. The checklist is to be utilized in conjunction with the guide.[648] Neither document, however, is an adequate device for measuring equal employment opportunity compliance.[649]

For example, the guide does not require that compliance reviews be made onsite. It states simply, "We would encourage, however, that each review include an onsite visit."[650] The experience of other Federal agencies indicates that recipients do not always provide accurate data. Onsite visits enable compliance personnel to verify program and employment data.

These documents also fail to deal adequately with the subject of

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646. This section indicates that, in attempting to resolve instances of non-compliance with the Equal Employment Opportunity regulations, BIPP will emphasize informal resolution through voluntary action by the recipients. Where this method is unsuccessful, CSC will suspend or terminate funding.

647. U.S. Civil Service Commission, Guide For Reviewing Nondiscrimination and EEO under the IPA Grant Program, attachment to CSC Operations Memo 150-329, Dec. 12, 1973.

648. U.S. Civil Service Commission, Nondiscrimination and EEO Review Guide and Checklist, attachment to CSC Operations Memo. 150-329, Dec. 12, 1973. The Nondiscrimination and EEO Review Guide and Checklist was developed pursuant to the findings and comments of IPPD staff in nine CSC regions where experimental equal employment opportunity reviews were conducted on 30 IPA grant projects.

649. CSC has stated that when it began its compliance program in May 1973 it recognized that changes would be necessary based on field experience with the guide and checklist. It also noted that some changes in the review procedure had already been made which had caused improvement over previous efforts and that the checklist will be revised to include inquiries into such areas as maternity leave benefits and language barriers. Hampton letter, supra note 472.

650. CSC states that in fiscal year 1974 only six review reports were completed without an onsite visit. Hampton letter, supra note 472.

affirmative action plans.[651] In the event that IPPD staff might require recipients to develop written affirmative action plans, something which had not been done as of January 1975,[652] the guide and checklist are of little value to staff reviewing such plans. The guide requires that the reviewer obtain EEO 4 data from the agency administering the grant. The EEO 4 data, however, are not sufficiently detailed to allow for a thorough review of a plan. They are predicated upon occupational groupings rather than individual job titles. Moreover, they do not cover personnel actions such as promotions, awards, transfers, and separations, the type of specific information needed by reviewers to analyze the employer's work force to determine if there is an underutilization of minorities and/or women which would necessitate corrective action to redress the imbalance.[653]

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[651] In discussing the fact that CSC equal employment opportunity regulations do not require that IPA recipients develop written plans, CSC's guide advised regional personnel that the purpose of the permissive wording of its regulations regarding written plans was intended to avoid burdening grantees by imposing an across the board requirement and to provide CSC with leverage, other than fund termination, in dealing with grantees. This language makes it appear as if imposition of an affirmative action plan is a penalty or sanction. Indeed, in this Commission's opinion it is not. It is rather a tool which can be used by recipients to achieve full compliance with the law.

[652] BIPP has not required any IPA grantees to develop written affirmative action plans because compliance review findings have not indicated the need for affirmative action plans. Russell telephone interview, supra note 636.

The equal employment opportunity checklist is deficient in several other respects. Many of its questions, pertaining to both grant administration and employment, are phrased in such a way as to generate monosyllabic written responses which do not convey sufficient information concerning the equal employment opportunity aspects of the program. Examples of such questions include the following:

> Are women and minorities among those being selected for training?
>
> Results of visual survey?

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653. CSC has recently written to this Commission that:

> We instructed Regional reviewers to obtain EEO-4 data since they are widely available. The data were not intended to substitute for a detailed analysis of the workforce. The revised checklist will require detailed information on the workforce. Hampton letter, supra note 472.

> Where the project involves the design of a recruitment system, are features being built into the design to assure equal opportunity for all segments of the population?
>
> Are steps being taken to assure that selection instruments are fair to all applicants and valid for the job to be filled?
>
> Does the agency have an affirmative action program?
>
> Are priorities and target dates assigned for accomplishing actions?
>
> Is there a system for evaluating accomplishments under the plan?
>
> Are application forms nondiscriminatory?
>
> Are positions advertised at all levels in the community?
>
> Are contacts maintained with women's groups and minority group organizations? [654]

Recognizing this problem, on February 6, 1975, after more than a year of experience with the checklist, CSC issued a field directive[655] providing additional instructions to IPPD staff on their use of the checklist. This directive instructed persons reviewing IPA grants and projects to provide detailed answers to all questions on the checklist rather than simple "yes" or "no" responses. BIPP has not, however, revised the checklist[656] itself.

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[654] U.S. Civil Service Commission, Nondiscrimination and EEO Review Guide and Checklist, Part I, EEO and Nondiscrimination Aspects of Program Substance and Participants and Beneficiaries, sections E and F; Part II, Employment Practices Checklist, sections A and B.

[655] CSC Operations Memo. 150-452 (Feb. 6, 1975).

[656] Russell telephone interview, supra note 636.

The checklist fails to address specific employment policies of the administering agency which have significant equal employment opportunity implications such as maternity leave benefits and the employment barriers for those applicants whose predominant language is other than English.[657] Moreover, in the section on skills development and training there is no mention of race or sex. In addition, the checklist does not require personnel conducting the review to evaluate employee grievance procedures or to ascertain whether recipients maintain complaint files or, if they do, to review such files.

B. Data Collection

As discussed in the Merit System Standards section of this report,[658] CSC does not collect race, ethnic, and sex data on State and local governments. It receives computer printouts of data collected by EEOC from State and local governments for health, welfare, and employment security programs. Under the IPA Grant Program BIPP has also advised regional staff making equal employment opportunity reviews to obtain from those agencies to be reviewed copies of the race, ethnic, and sex data they have compiled for EEOC.[659]

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[657] CSC instructed its reviewers to look into the special problems of persons with English language deficiencies. CSC Operations Memo. 150-406 (August 1974).

[658] For a discussion of CSC's data collection activities regarding State and local governments see p. 182 supra.

[659] U.S. Civil Service Commission, Guide For Reviewing Nondiscrimination and EEO Under the IPA Grant Program, section VII, Use of EEO-4 Data.

C. Compliance Reports

CSC's regulations provide for the submission of compliance reports by IPA grant recipients as CSC deems necessary to effect compliance.[660] CSC has not requested IPA recipients to submit equal employment opportunity compliance reports. It believes that the submission of compliance reports is not necessary as long as the IPA recipient maintains and has available for onsite reviews adequate compliance records.[661] These records should include the agency's personnel procedures, any complaint records the agency maintains, and EEO 4 data.[662] As previously discussed, EEO 4 data is not sufficiently specific to pinpoint problems of underutilization or discrimination. Records which require analysis include information on personnel actions and individual job titles cross classified by race, ethnicity, and sex. If IPA recipients were required to submit compliance reports containing this kind of information to BIPP, it would be a valuable gauge for establishing compliance review workloads and priorities.[663]

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[660] The regulations state that:

> Each recipient shall maintain
> records and submit to the
> Commission timely, complete,
> and accurate compliance records
> at the times, in the form, and
> containing the information the
> Commission determines necessary
> to enable it to determine whether
> the recipient has complied or is
> complying with this subpart.
> 5 C.F.R. § 900.508(b).

[661] Heuerman interview, supra note 500.

[662] Interview with Ellen Russell, Grants Specialist, Grants Administration Division, BIPP, CSC, Feb. 10, 1975.

D. Compliance Reviews

BIPP's central office establishes the equal employment opportunity compliance review workloads for the regions. In fiscal year 1974 the large CSC regions[664] were required to conduct between three and six reviews, and small regions[665] were to conduct two to four reviews.[666] The central office reported that a total of 32 reviews covering 32 of its 111 grantees were made in that fiscal year.

BIPP requires regional personnel to complete a copy of the Nondiscrimination and EEO Review Guide and Checklist when conducting a compliance review. This entails answering the questions contained in the checklist. As discussed earlier, the checklist is an inadequate device for measuring equal employment opportunity compliance. Moreover, compliance reviews of IPA grant programs reviewed by staff of this Commission indicated that there were additional problems concerning the reviews.

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663. CSC has indicated that it is "considering an approach to obtaining data on the workforce and personnel actions, such as you have described, prior to the conduct of a compliance review." Hampton letter, supra note 472.

664. Atlanta, Chicago, Dallas, New York, Philadelphia, and San Francisco.

665. Boston, Denver, St. Louis, and Seattle.

666. CSC Operations Memo. 150-329 (Dec. 12, 1973).

In two instances regional personnel did not even furnish the information requested by the checklist. The reviewer of an IPA grant in Michigan[667] completed the recruitment and selection section of the checklist by stating that recruitment is not the responsibility of the particular unit of the agency administering the grant but is the responsibility of another department within the agency. However, CSC regulations indicate that a recipient of an IPA grant may not discriminate in its employment practices[668] and thus the question of who does the recruitment is not relevant. Even where the recruitment is done by a separate entity, the recipient is fully responsible for the practices employed. Therefore, the information on recruitment and selection should have been included in the compliance review. Another example of failure to answer all the checklist questions occurred in a review conducted of Maricopa County, Arizona.[669]

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667. U.S. Civil Service Commission, Equal Employment Opportunity Review of IPA Grant 74-MI-01C, Michigan Department of Civil Service-Training Division, June 20, 1974.

668. 5 C.F.R. § 900.506(a).

669. U.S. Civil Service Commission, Equal Employment Opportunity Review of IPA Grant 74AZ01C(1), Maricopa County, Arizona, Mar. 13, 1974. Maricopa County is one of Arizona's more populous counties. Moreover, eighteen percent of the county's residents are members of minority groups. U.S. Census of Population: 1970, Vol. 1, Characteristics of the Population, Part 4, Arizona, Tables 119, 125, 130.

Although the reviewers noted that an affirmative action plan had been prepared and submitted to the County Board of Supervisors, there was no further information in the review concerning the plan's status or specific elements of the plan. Checklist questions on these points were left unanswered.[670]

Another deficiency of the Maricopa County review was that it made inadequate recommendations for corrective action. Responses to questions on the checklist indicated that the county utilized discriminatory job application forms, did not evaluate its employment standards for job relatedness, had made only minimal attempts to review examination methods and materials for job relatedness, and did not have a formal system for processing equal employment opportunity discrimination complaints. The reviewers, however, recommended no specific corrective actions in their overall evaluation of the program. Instead the reviewers stated:

> The IPA project itself is completely in line with the Merit Principles of the Intergovernmental Personnel Act. The County is just beginning to actively attempt to comply with EEO regulations, as evidenced by their recent preparation of an Affirmative Action Plan. Most County personnel resources are utilized in the routine personnel activities required of such a department. It is through programs such as the IPA provides, that they will be able to more quickly

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[670] Even in those instances where grantees may develop written affirmative action plans, they are not required to submit their plans or copies of their plans to BIPP or its IPPD staff. The mere existence of an affirmative action plan does not mean it is an effective plan. This is especially true for plans developed pursuant to CSC's booklet on affirmative action, which does not set sufficiently high standards for affirmative action plans. Of 32 IPA grantees reviewed in fiscal year 1974, 16 had affirmative action plans, 6 were in the process of developing plans, and 10 grantees did not have affirmative action plans. Telephone interview with Ellen Russell, Grants Specialist, Grants Administration Division, BIPP, CSC, Dec. 10, 1974.

> comply with Nondiscrimination and EEO regulations and begin to utilize truly job related selection procedures in their examination process. 671

Another example of inadequate recommendations for corrective action involved a review made of an IPA grant project conducted in South Bend, Indiana. Answers to the checklist questions stated that services provided under the grant are not consistent with Equal Employment Opportunity Regulations and that beneficiaries of the grant project are not chosen on a nondiscriminatory basis. Additional information indicated that no attempts are made to recruit minorities and women, that no efforts are made to identify potential among lower-level employees, and that employees are not advised of their right to file a complaint of discrimination or informed of the procedure for doing so. The reviewer's comments in the overall evaluation section of the checklist, which is intended to include recommendations for corrective action, read simply:

> The EEO Officer and the Director of Human Resources and Economic Development feel that they are not doing the job in affirmative action planning and EEO that they should be. The grant project is to develop and institute an affirmative action plan for the city and three other cities. They are proceeding fairly well, but they are working in a not too receptive environment. The city has about 15 percent of its employees subject to Federal Standards but the majority of the remainder are appointed on a strictly patronage basis. 672

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671. U.S. Civil Service Commission, Equal Employment Opportunity Review of IPA Grant 74AZ01C(1), Maricopa County, Arizona, Mar. 13, 1974.

672. U.S. Civil Service Commission, Equal Employment Opportunity Review of IPA Grant 74IN04C, City of South Bend, Indiana, June 26, 1974.

The failure of reviewers to make specific recommendations for necessary and essential corrective actions, as in these instances, relegates compliance reviews to an information gathering procedure rather than as a part of a law enforcement program.

E. Complaint Investigations

As noted earlier, BIPP officials feel they have no enforcement authority under the IPA in individual cases of discrimination because of the Act's statutory provisions.[673] Therefore, complaints involving the IPA grant program are reviewed for program consistency and not for redress of individual grievances. In order to assist complainants with their individual situations IPPD staff refer them to the EEOC or State fair employment practices commissions.

BIPP reported it had received two complaints involving IPA grants from the initiation of the grant program in July 1971 through October 1974. Both were in the Atlanta region. One complaint received in October 1973 alleged sex discrimination by the South Carolina State Personnel Department. The complainant also filed with the Equal Employment Opportunity Commission and the South Carolina Human Affairs Commission. In correspondence with EEOC's Atlanta District Office and the South Carolina Human Affairs Commission CSC stated:

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673. Intergovernmental Personnel Act of 1970, 42 U.S.C. § 4728 (1970).

> We prefer to avoid concurrent investigation of the charges since we feel this may be a duplicative effort. Additionally, we feel our review for program compliance would not suffice for a determination of individual discrimination whereas your findings might show whether or not the program is in compliance. Therefore, we are considering delaying our decision on whether or not to conduct a program review until your findings and recommendations are complete. 674

As of February 1975 EEOC's Atlanta Office had not assigned the complaint for investigation.[675] CSC's Atlanta Office has requested a report from the State agency and made followup inquiries in February 1974 but had not received a written report from the South Carolina agency as of February 1975.[676] In January 1975, 16 months after it recieived the complaint, CSC staff conducted a qualitative evaluation of the South

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674. Letter from Hammond B. Smith, Director, Atlanta Region, CSC, to Thomas McPherson Jr., Director, Atlanta District Office, EEOC, Oct. 29, 1973, and letter from Hammond B. Smith, Director, Atlanta Region, CSC, to George Hamilton, Commissioner, South Carolina Human Affairs Commission, Dec. 17, 1973.

675. Telephone conversation with Ann James, Supervisor, Control Section, Atlanta District Office, EEOC, Feb. 19, 1975.

676. CSC recently informed this Commission that:

> On April 10 we learned that the South Carolina Human Affairs Commission had completed its investigation of the complaint and found no evidence of discrimination in the selection. The Regional office, however, will continue to work with the State to assure that the conditions alleged by the complainant are not a part of the personnel system in South Carolina. Hampton letter, supra note 472.

Carolina Personnel Department under the Merit System Standards. A written report of the evaluation was not available as of late February 1975.[677]

The other complaint, received August 23, 1974, alleged that the Florida Department of Community Affairs failed to follow State civil service selection procedures. On September 3, 1974, CSC's Atlanta Office notified the complainants that their complaint had been received but in order to secure their individual rights they should contact the EEOC. On the same day CSC's Atlanta regional director sent a letter to the Secretary of Administration of the Florida Department of Administration requesting a report on the complaint. No response was received and a followup letter was sent by CSC on November 11, 1974. On November 21, 1974, the agency replied that it was looking into the matter and hoped to resolve it soon. On December 30, 1974, it was learned by CSC that a complaint concerning this matter had also been filed with EEOC. As of mid-April 1975, CSC reported that EEOC is arranging for a pre-decision settlement meeting between the State agency

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677. Telephone interview with Ellen Russell, Feb. 20, 1975. CSC contends that it did not conduct an evaluation of the South Carolina agency earlier because its regional staff was working with the agency on the consolidation of the State's separate merit systems. Hampton letter, *supra* note 472.

officials and the complainants. Based on the actions of the State officials and EEOC and the nature of the complaint,[678] CSC decided that a review of the IPA-funded program was not warranted.[679] CSC has in the South Carolina and Florida complaint cases abdicated its civil rights responsibility and assumed a mere information gathering posture.[680] This is a violation of both the spirit and the letter of the Intergovernmental Personnel Act and CSC's own Equal Employment Opportunity regulations.

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[678] 678. The two complainants alleged unfair selection procedures. CSC contends that the factors which convinced it not to investigate the matter were that the failure to advertise a position and the job involved no promotion but was only a one year reassignment, that no posting was required for the job, and that the complainants were aware that the job would exist. Hampton letter, supra note 472. It is not clear to this Commission, however, what these factors have to do with the decision of whether or not to investigate a complaint of unfair selection procedures.

[679] 679. BIPP central office Florida correspondence file. Russell interview, supra note 662. Hampton letter, supra note 472.

[680] 680. CSC recently informed this Commission that:

> Based on the difficulties encountered in coordinating with other equal employment opportunity enforcement agencies, we are considering a change in our regulations to put a time limit on our deferral to EEOC or other appropriate agencies. Hampton letter, supra note 472.

The fact that BIPP has received two complaints in two years should not be construed to indicate an absence of discrimination. It is agreed that few victims of discrimination ever file complaints and that the number of complaints filed does not often bear any relationship to discrimination that may be occurring. Persons who have been discriminated against may elect not to file a complaint because of reluctance to be involved in the complaint process or because of skepticism about the effectiveness of the complaint process.[681]

Another factor limiting the number of complaints filed against CSC's IPA grant program may be CSC's failure to adequately publicize the right of beneficiaries to file discrimination complaints with it.[682] The Equal Employment Opportunity regulations provide[683] that recipients of IPA grants are to furnish participants, beneficiaries, and other interested persons with information pertaining to the protection against discrimination assured by the IPA. However, the only requirement that BIPP has made of recipients in this regard is that they indicate on descriptive, informational material that the programs are nondiscriminatory. With the exception of its regulations, CSC has not developed materials notifying beneficiaries of IPA grants or employees of agencies or organizations administering IPA grants of their right to file an equal employment opportunity complaint with BIPP. This does little to facilitate the filing of complaints and may even have the effect of preventing complaints from being filed.[684]

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[681] For a further discussion of this point, see U.S. Commission on Civil Rights, To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs 61 (1973).

[682] CSC has stated that it "will take a fresh look to insure that beneficiaries are informed of their right to file discrimination complaints with the Commission." Hampton letter, supra note 472.

[683] 5 C.F.R. § 900.508(e).

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[684] CSC, in a summary statement concerning this chapter, stated:

> The Civil Service Commission has devoted a significant portion of its financial and staff resources to equal employment opportunity efforts with State and local governments, as large a portion as could be allocated without failing to meet its other statutory responsibilities. Even so we are not statisfied with the level of effort we have been able to mount. A great deal has been accomplished, but more remains to be done.
>
> Nevertheless, we consider the draft report on the Civil Service Commission's program efforts to be highly questionable. The Commission on Civil Rights would report to the Congress and the nation that, in effect, nothing has been done. It would lead the American public, especially minorities, to believe that the resources the U.S. Government has devoted to equal employment opportunity have been misused and have gone for naught, and that, by implication, there is little basis for any optimism. This report consists of erroneous conclusions which are based on misinformation and lack of understanding of Civil Service Commission policy and efforts. Hampton letter, *supra* note 472.

Chapter 3

DEPARTMENT OF LABOR

OFFICE OF FEDERAL CONTRACT COMPLIANCE (OFCC)

I. Introduction

An estimated 30 to 40 million workers, or approximately 40 percent of the Nation's total civilian workforce, are employed by companies and institutions which are Federal Government contractors.[685] Minority males and females, as well as nonminority females, are substantially underrepresented in these contractors' workforces, and they are concentrated heavily in the lower-paying jobs.[686]

The President has the duty and the authority, under the Constitution and through the Executive's control over the Government's procurement process, to require employers who do business with the Government to provide equal employment opportunity.[687] In its procurement of property and services, which amounted to more than $100 billion during fiscal year 1972,[688] he Federal Government has a vital interest in ensuring that its suppliers do nc increase costs and program delays by excluding from the labor pool available : male and minority workers. The economic cost to society of discrimination in the labor force of Federal contractors has been estimated to be approximately $24 billion each year.[689] Further, when the Federal Government assists or enters into contractual agreements with private employers whose practices discriminate against minorities and women, such action, alone, may well constitute unconstitutional discrimination by the Government.[690]

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[685] Interview with George Travers, Associate Director, Plans, Policies and Programs, OFCC, Department of Labor, July 24, 1974. See also Tables A&B in the Appendix.

[686] J.R. Lyle, Differences in the Occupational Standing of Negroes Among Industries and Cities (1970); Spanish Surnamed American Employment in the Southwest, Colorado Civil Rights Commission under the auspices of the Equal Employment Opportunity Commission (no date); R.B. McKersie, An Analysis of Minority Employment Patterns in the Chicago SMSA (1967).

[687] The authority of the President to issue Executive orders requiring fair employment practices by Government contractors has been sustained by numerous legal opinions and court decisions. 42 Op. Att'y Gen., No. 21 (1961); 42 Comp. Gen. 692 (1963); Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971); Farkas v. Texas Instrument Co., 375 F.2d 629 (5th Cir. 1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3rd Cir. 1964); Legal Aid Society of Alameda County v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974).

[688] Council of Economic Advisors, Economic Indicators 37 (June 1974).

Presidential authority to require equal employment practices of Government contractors has been exercised for more than 30 years through successive Executive orders.[691] The first Executive order to prevent employment discrimination bv Government contractors was issued by President Franklin D. Roosevelt in 1941.[692] This order, like most of its successors, was administered by a committee in the Executive Office and did not grant the committee any enforcement authority.[693] Executive Order 10925, issued by President

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689. Memorandum to Heads of All Agencies from Philip J. Davis, Director, Office of Federal Contract Compliance (OFCC), Department of Labor, July 30, 1973.

690. See Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Bolling v. Sharpe, 347 U.S. 497 (1954); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); cf. Simkins v. Moses H. Cone Memorial Hosp.,. 323 F.2d 959 (4th Cir. 1963).

691. For a more detailed account of the development of the Federal contract compliance program prior to 1965, see R.P. Nathan, Jobs and Civil Rights: The Role of the Federal Government in Promoting Equal Opportunity in Employment and Training 87-89 (prepared for the U.S. Commission on Civil Rights by the Brookings Institution 1969) [hereinafter cited as Jobs and Civil Rights]; and U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 141-44 (1970) [hereinafter cited as Enforcement Effort report].

692. Exec. Order No. 8802, 3 C.F.R. 1938-1943 Comp., p. 957.

693. Jobs and Civil Rights, supra note 691.

Kennedy in 1961, for the first time established specific sanctions for noncompliance.[694] In 1965, President Johnson's Executive Order 11246 created a new administrative arrangement, in which the Secretary of Labor, rather than a Presidential committee, was charged with supervising and coordinating the Federal contract compliance program.[695] Executive Order 11246 prohibited discrimination in employment on the basis of race, creed, color, or national origin and required contractors to take affirmative action to ensure that equal opportunity was provided. In 1967, sex was added as a prohibited basis of discrimination by Executive Order 11375.[696]

The current Executive orders mandate the Secretary of Labor to administer and oversee an extensive program to eliminate employment discrimination by Government contractors, subcontractors, and construction contractors working on Federal and federally-assisted construction projects.[697]

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[694] Exec. Order No. 10925, 3 C.F.R., 1959-1963 Comp., p. 448. The sanctions included termination of contracts and debarment from future contracts. *Id.* §§ 312 (d)(e).

[695] Exec. Order No. 11246, 3 C.F.R., 1964-1965 Comp., p. 339.

[696] Exec. Order No. 11375, 3 C.F.R., 1966-1970 Comp., p. 684. Executive Order 11246 (1965), as originally promulgated by President Johnson, had three parts. Part I, Nondiscrimination in Government Employment, was superseded by Executive Order No. 11478, 3 C.F.R., 1966-1970 Comp., p. 803. Part II, Nondiscrimination in Employment by Government Contractors and Subcontractors, was amended to add sex as a prohibited basis of discrimination by Executive Order No. 11375. Part III, Nondiscrimination Provisions in Federally Assisted Construction Contracts, incorporates by reference all of the provisions of Part II and, thus, also prohibits sex discrimination, although it was not technically amended by Executive Order No. 11375. Executive Order No. 11375 also changed the term "creed" as a prohibited basis of discrimination to the term "religion."

[697] Exec. Order No. 11246, Part II, Secs. 201, 202, 203; Part III, Sec. 301, 3 C.F.R., 1964-1965 Comp., p. 340, 341.

The Secretary of Labor has delegated the authority for carrying out the responsibilities under the orders to the Director of the Office of Federal Contract Compliance (OFCC) within the Department of Labor.[698] The Director of OFCC has, pursuant to the Executive orders, delegated some authority to contracting Federal agencies to enforce contract compliance regulations;[699] but this authority is to be exercised only under the Director's general guidance and control.[700]

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[698] The Director, however, does not have the authority to issue rules and regulations of a general nature.

[699] 41 C.F.R. § 60-1.2 (1974).

[700] 41 C.F.R. § 60-1.46 (1974).

II. The Requirements of the Executive Orders and OFCC Regulations

A. The Equal Opportunity Clause

The Executive orders require each Federal agency to include in its contractual agreements with contractors an equal opportunity clause. The clause indicates that contractors make two basic contractual commitments: (1) not to discriminate in employment on the basis of race, color, sex, religion, or national origin,and (2) to undertake affirmative action to ensure that equal employment opportunity principles are followed in personnel practices at all company facilities, including those facilities not engaged in work on a Federal contract.[701] Government contractors must also obtain similar guarantees from all of their subcontractors.[702]

In addition to setting forth requirements for Federal contractors and subcontractors, the Executive orders require each applicant for Federal assistance to include in its contracts with construction contractors, who are involved in a federally-assisted project, nondiscrimination and reporting provisions specified by the rules and regulations of the Secretary of Labor.[703] The OFCC regulations implementing this provision of the order require the inclusion of an equal opportunity clause substantially identical to that required of direct Government contractors and subcontractors.[704]

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[701] Exec. Order No. 11246, Part II, Secs. 202, 204, 3 C.F.R., 1964-1965 Comp., p. 340, as amended by Exec. Order No. 11375, 3 C.F.R., 1966-1970 Comp., p. 685. The term "Government contract," as defined in OFCC regulations, means any agreement or modification of agreement between any contracting agency (Federal Executive Branch) and any person for the furnishing of supplies or services or for the use of real or personal property. 41 C.F.R. § 60-1.3(m)(1974). The Executive order does not cover grants, except grants for construction.

[702] Exec. Order No. 11246, Part II, Sec. 203, 3 C.F.R. 1964-1965 Comp., p. 341, 342, as amended by Exec. Order No. 11375, 3 C.F.R., 1966-1970 Comp., p. 606 (1967). Unless otherwise indicated, the term "contractor" will be used to include "subcontractor."

[703] This requirement applies to applicants for assistance in the form of grants, loans, insurance, or guarantees. Exec. Order No. 11246, Part III, Sec. 301, 3 C.F.R., 1964-1965 Comp., p. 345.

Further, the equal opportunity clause requires the contractor also to certify that it does not maintain segregated facilities and, further, that it does not permit its employees to perform services at any location within its control where segregated facilities are maintained. This certification requirement applies only in cases where the contract amounts to $10,000 or more.[705]

The OFCC regulations implementing the Executive order have restricted the scope of its application by exempting certain contracts from the requirements of the equal opportunity clause. Contracts for less than $10,000 are exempted altogether.[706] State and local governments having Federal contracts must include the equal opportunity clause in those contracts, but the clause is not applicable to those governments' subdivisions or agencies which do not participate in work under the contract.[707]

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704. 41 C.F.R. §§ 60-1.4(b), 60-1.5(a)(1974).

705. 41 C.F.R. §§ 60-1.8, 60-1.5(a)(1974).

706. 41 C.F.R. § 60-1.5(a)(1)(1974). In federally-assisted construction contracts, the total amount of the construction contract, and not the amount of the Federal financial assistance, determines whether the clause is required. Id.

707. 41 C.F.R. § 60-1.5(a)(4)(1974). Further exemptions are provided for contracts and subcontracts performed outside the United States and for open-end and similar agreements for indefinite quantities, where the purchaser reasonably believes that the amount to be ordered in any year will be under $10,000. 41 C.F.R. § 60-1.5(a)(2) and (3)(1974). Moreover, the Director of OFCC or the head of a contracting agency may exempt any specific contract or contractor's facility from the requirements of the order for reasons of national security. 41 C.F.R. §§ 60-1.5(b)(1) and (c). All of these exemptions are permitted, but not required, by the Executive order. Exec. Order No. 11246, Sec. 204. In 1975, OFCC revised its regulations to exempt religious educational institutions from the Executive order's requirements with respect to employing persons of a particular religion. 41 C.F.R. § 60-1.5, 40 Fed. Reg. 13218 (1975). While OFCC indicated that the purpose of the proposed change was to make its regulations consistent with section 702 of Title VII (42 U.S.C. § 2000e-1, 1970), there is no basis in the Executive orders for such an exemption.

B. Affirmative Action Requirements

The Executive orders require contractors to take affirmative action to eliminate discriminatory employment practices. To implement this requirement, OFCC has issued two basic sets of regulations. The first regulations, which were issued in 1968, require contractors to evaluate the minority representation (or utilization) in all job categories: to develop an affirmative action program for each company facility; and to complete an annual report of the results of the program. However, OFCC has exempted State and local government contractors, with the exception of medical and educational facilities, from these requirements.[708] These general affirmative action requirements were clarified and expanded by a second set of regulations, issued in 1970 and significantly revised in 1971.[709] The second set of regulations, known as Revised Order No. 4 and applicable to all nonconstruction contractors, required contractors, for the first time, to develop affirmative action programs for women.[710] In addition, Revised Order No. 4 introduced the requirement that contractors remedy the effects of past discrimination experienced by incumbent employees.[711] Finally, the regulation established a procedure to be followed by Federal agencies prior to imposing sanctions for failure to comply with the affirmative action requirements.[712]

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[708] 41 C.F.R. § 60-1.40 (1974). OFCC excludes most State institutions in order to "preserve the maximum autonomy of State Government consistent with the objectives of Executive Order 11246...," but includes State medical and educational facilities because the majority of State and local employees working on or under Federal contracts are employed by those institutions. Letter to Senator Clifford P. Case from Philip J. Davis, Acting Director, OFCC, Dec. 12, 1972.

[709] 41 C.F.R. § 60-2 (1974). Further revisions were made in 1974 in conjunction with the issuance of a compliance review procedure, Revised Order No. 14. 41 C.F.R. §§ 60-2 and 60-60 (1974), 39 Fed. Reg. 25654 (1974). This review procedure is discussed on pp. 289-328 infra.

[710] Revised Order No. 4, in contrast to the earlier affirmative action requirements, applies only to nonconstruction contractors. In February 1973, OFCC proposed amendments making Revised Order No. 4 applicable to some construction contractors, but only with regard to their employees not actively engaged in construction work. 38 Fed. Reg. 3071 (1973). As of February 1975, these proposed amendments had not been adopted.

Revised Order No. 4 requires a contractor to conduct a utilization analysis of its workforce to determine if there are fewer women or minorities employed in each job title than would be expected by their availability for the job.[713] If this analysis shows that women and minorities are underutilized in the contractor's workforce, then the contractor is required to develop numerical goals and timetables, or measurable targets, which must be directed to obtaining prompt and full utilization of minorities and women.[714] Goals and objectives must be developed by job classification and organizational unit, but all minorities may be grouped in each goal unless there is a "substantial disparity in the utilization of a particular minority group or men and women of a particular minority group."[715] Additional required elements of an affirmative action plan include the development and implementation of internal auditing systems to measure the effectiveness of the plan, the development or reaffirmation of an equal employment opportunity policy and dissemination of the policy, the development and implementation of "action oriented" programs (such as validation of tests and other selection techniques to assure their job-relatedness) and support of outside programs designed to improve employment opportunities for minorities and women. Besides listing the required ingredients of an affirmative action program, Revised Order No. 4 outlines examples of procedures which contractors should follow in implementing an affirmative action program.[716]

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[711] 41 C.F.R. § 60-2.1 (1974). The regulation requires that "Relief for members of an 'affected class' who, by virtue of past discrimination, continue to suffer the present effects of that discrimination shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An 'affected class' problem must be remedied in order for a contractor to be considered in compliance." Prior to 1974, contractors were required to provide affected class relief on their own initiative--either in the affirmative action plan or in a separate "Corrective Action" program. The revision made in 1974 requires that such relief be provided only after a compliance officer has conducted an onsite compliance review and identified affected class problems to be corrected in a conciliation agreement. 41 C.F.R. §§ 60-2.1 and 60-60.6 (1974). As of July 1974, OFCC had never issued any regulation or guideline explaining to contractors their obligations under the affected class provision of Revised Order No. 4. This problem is discussed on pp. 239-44 infra.

[712] 41 C.F.R. § 60-2.2 (1974).

[713] 41 C.F.R. § 60-2.11(a) (1974), as revised, 39 Fed. Reg. 25654 (1974). Availability is determined by considering such factors as the percentage of women or minorities in the area's workforce, the number of minorities and women having the necessary skills for the jobs, the existence of training institutions, and the size of minority and female unemployment in the surrounding area. The contractor must also consider the availability of promotable and transferable female employees within its organization. 41 C.F.R. § 60-2.11(b) (1974). Memorandum to Heads of All Agencies, Technical Guidance Memo. No. 1 on Revised Order No. 4, from Philip J. Davis, Director, OFCC, Feb. 22, 1974 /hereinafter cited as Technical Guidance Memo. No. I on Revised Order No. 4/.

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[714] 41 C.F.R. § 60-2.10 (1974). Goals are not quotas which must be met but, rather, objectives by which good faith effort may be measured. 41 C.F.R. § 60-2.12 (1974). Determination of whether a contractor is in compliance with the Executive orders is not judged solely by whether or not it reaches its goals; instead, a contractor's compliance status is reviewed in light of the contents of the total affirmative action plan and the extent of adherence to the plan. 41 C.F.R. s 60-2.14 (1974). A failure of a contractor to meet its goals may result in the issuance of a show cause notice. See p. 254 infra. On August 11, 1972, President Nixon issued a letter to all agencies cautioning against the use of numerical goals predicated on proportional representation or applied as if they were quotas. In September 1972, OFCC reviewed its regulations and orders and found that they were not in conflict with the President's directive. Memorandum to All Heads of Agencies, from James D. Hodgson, Secretary of Labor, Sept. 15, 1972. For further discussion of the concepts of goals and timetables, see U.S. Commission on Civil Rights, Statement on Affirmative Action for Equal Employment Opportunities (1973).

[715] 41 C.F.R. § 60-2.12(k)(1974). This provision does not define the term "substantial disparity." It is deficient because it allows contractors to ignore some underutilization of a particular minority group and because it allows contractors to count minority females both in goals for minorities and goals for women. OFCC does not intend to amend this provision to correct these deficiencies. Interview with Robert Hobson, Associate Director, OFCC, July 24, 1974.

[716] 41 C.F.R. § 60-2.20-2.26 (1974).

In order for a contractor to be held in compliance, Revised Order No. 4 requires that it provide relief to incumbent employees who have been subjected to discrimination in the past and who continue to suffer the present effects of that discrimination.[717] Such persons are called an "affected class." Unfortunately, Revised Order No. 4 does not establish specific requirements or procedural guidelines for identifying or remedying affected class problems.[718] As early as November 1971, OFCC prepared draft guidelines on affected class identification and remedies.[719] These guidelines were not released on the ground that their implementation should await the resolution of affected class issues in a case involving the Sparrows Point, Maryland, plant of Bethlehem Steel Corporation.[720] The long delay in resolving the Sparrows Point case, the resultant failure of OFCC to issue any formal guidelines, and the unofficial position OFCC has taken concerning back pay raise a question about OFCC's desire to make whole the victims of past discrimination.

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[717] 41 C.F.R. § 60-2.1 (1974). In interpreting Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*. (1970), the courts early established the principal that victims of discrimination prior to 1964 who continue to suffer the effects of that discrimination after it became unlawful are entitled to remedial relief. In fashioning remedies for such employees, the courts have ordered financial restitution or back pay, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); United States v. Wood, Lathers Internat'l Union, Local 46, 328 F. Supp. 429 (S.D.N.Y. 1971); revised transfer and promotion systems, Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); United States v. Local 189, United Papermakers, 282 F. Supp. 39 (E.D. La. 1968), [granting injunction against union strike], 301 F. Supp. 906 (E.D. La. 1969) (ordering, among other things, revised transfer system), *aff'd*, 416 F.2d 980 (5th Cir. 1969). The initial decision in United States v. United Papermakers Local 189 held that the Crown Zellerbach Company's seniority system was a violation of both Title VII and Executive Order 11246. Subsequently, OFCC issued a memorandum to agency contract compliance officers notifying them that the existence of a contractor seniority system, such as those struck down in Quarles and United Papermakers, was grounds for a finding of noncompliance with the Executive orders if the contractor did not institute changes in the system. Memorandum to Contract Compliance Officers from Ward McCreedy, Acting Director, OFCC, Aug. 8, 1968. The requirement of revised transfer and promotion systems to remedy the effects of discriminatory seniority systems was not issued in the form of a regulation at that time. Revised Order No. 4 was the first OFCC regulation requiring relief for victims of past discrimination.

[718] See pp. 243-44 *infra* for a discussion of DOL action in this matter.

[719] U.S. Dept. of Labor, OFCC (draft) Guidelines for Identification and Resolution of Affected Class Discrimination, Nov. 1, 1971.

The Sparrows Point case began in 1968 when OFCC ordered the facility to institute a revised transfer and promotion system which would permit minorities to transfer into predominantly white departments without loss of seniority or wage rate.[721] Bethlehem Steel objected to the seniority carryover and rate retention provisions of OFCC's order and requested that a hearing be held. A hearing panel, convened by the Secretary of Labor, unanimously found that the company had discriminated against blacks at the Sparrows Point plant by placing them in inferior departments and that such discrimination was continued by the maintenance of a departmental seniority system which locked blacks into inferior positions and discouraged them from transferring to better units. The panel, however, rejected the transfer system ordered by OFCC, which required rate retention and seniority carryover.

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720. Interview with William Kilberg, Solicitor of Labor, and Ronald Green, then Deputy Solicitor of Labor for Civil Rights, Dept. of Labor, Aug. 16, 1973; and interview with Francis R. Ridley, Chief, Compliance Operations, OFCC, Aug. 8, 1973.

721. OFCC's order was consistent with the remedies ordered in Quarles v. Philip Morris, Inc., supra note 717 and United States v. United Papermakers Local 189 supra note 717. See Bethlehem Steel Corp., Decision of the Secretary of Labor at 10, Docket No. 102-68 (Jan. 15, 1973).

The panel's findings and conclusions were submitted to the Secretary in December 1970.[722]

In the meantime, the courts handed down a number of decisions upholding rate retention and seniority carryover as necessary remedies for affected class problems.[723] Indeed, in a case raising issues virtually identical to those raised in the Sparrows Point case, the U.S. Court of Appeals for the Second Circuit ruled that the Lackawanna, New York, plant of Bethlehem Steel should be ordered to implement a revised transfer system including rate retention and seniority carryover.[724] This decision was rendered in June 1971, but it was not until January 1973 that the Secretary of Labor issued his order in the Sparrows Point case, reversing the panel's recommendations and upholding in significant part OFCC's rulings on affected class relief.[725] Thus, despite strong judicial precedent supporting OFCC's position on relief to victims of discriminatory seniority practices, the contract compliance program was paralyzed in this area of affected class relief because of the inexplicable two-year delay in the Secretary's Sparrow's

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[722] Id.

[723] Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), rev'd on other grounds, 401 U.S. 424 (1971); Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970); Clark v. American Maritime Corp., 304 F. Supp. 603 (E.D. La. 1969); Quarles v. Philip Morris. Inc., supra note 717; United States v. Local 189 United Papermakers, supra note 717; see also Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969).

[724] United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

[725] U.S. Dept. of Labor, News Release 73-881, Jan. 17, 1973.

Point decision.[726]

In addition to revised transfer and promotion systems, another form of remedy which should be afforded affected class members in many cases is financial restitution or "back pay."[727] OFCC has never required a contractor to give back pay.[728] OFCC has also failed to issue any final guidelines or requirements on back pay. A draft discussion paper attempting to clarify OFCC's back pay policy was developed and circulated by the Office of the Solicitor of Labor early in 1973.[729] The Solicitor's proposal would have prohibited sanction proceedings against contractors refusing to provide back pay relief ordered by OFCC or a compliance agency if an action under Title VII of the 1964 Civil Rights Act[730] or the Equal Pay Act[731] were available. This proposal would have deprived the Executive order program of an important compliance tool, since back pay orders can act as a strong deterrent to discrimination.[732]

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[726] The Department of Labor maintains that OFCC during this period continued to work with compliance agencies on affected class problems. Letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, from John T. Dunlop, Secretary of Labor, Apr. 24, 1975 (Appendix I). However, compliance activities concerning affected class problems, where they occurred, suffered from a lack of any clear, consistent policy from OFCC. For an illustration of the inadequacies in OFCC's approach to affected class relief during this period, see Rogers v. Int'l Paper Co., No. 74-1101 and 74-1115 (8th Cir. Jan. 7, 1975). See also, U.S. Comptroller General, The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved 15 (Apr. 29, 1975) /hereinafter cited as 1975 GAO Report/.

[727] For a discussion of the authority to order back pay relief under the Executive order, see Back Pay Awards: A Remedy Under Executive Order 11246, 22 Buff. L. Rev. 439 (1973).

[728] If a contractor refuses to comply with a compliance agency's order to give back pay to an affected class, the enforcement procedure calls for the issuance of a show cause notice and the holding of a debarment hearing. For a discussion of the use of show cause notices see Section E of this Part, p. 252 infra. No agency has ever been permitted to begin this procedure when a contractor has refused a back pay order. Interview with Philip J. Davis, Director, OFCC, July 23, 1974. While OFCC has never required a contractor to give back pay, it has been a party to consent decrees along with the Equal Employment Opportunity Commission, the Department of Justice, and the Wage & Hour Division of the Department of Labor, in which back pay has been awarded by contractors under the Equal Pay Act, 29 U.S.C. § 2061 (1970); Title VII 42 U.S.C. § 2000e et seq. (1970); and the Executive orders. See Part V, Section C infra. DOL has stated that contractors have been required to award back pay under existing policies and that back pay awards have been made. Dunlop letter, supra note 726.

[729] Discussion Draft, "Clarification of Back Pay Policy under Executive Order 11246 (as amended)," (undated). Interview with William Kilberg, Solicitor of Labor, Department of Labor, Aug. 9, 1973.

It was not until three years after OFCC established the requirement of affected class relief that any instructions were provided to compliance agencies on enforcing this provision. A Standard Compliance Review Report issued in 1974 contained some guidelines on identifying an affected class.[733] The compliance reviewer is instructed to identify jobs with substantial concentrations of minorities and women and to determine whether these concentrations exist because of past or current discriminatory placement policies by the contractor. If discriminatory placement policies have occurred, then the incumbent employees in these jobs are to be considered members of an affected class. The Compliance Review Format does not, however, instruct agencies concerning the relief which must be provided affected class members nor is it directed at delineating the responsibilities of contractors in identifying and remedying affected class problems.[734]

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730. 42 U.S.C. § 2000e _et seq_. (1970).

731. 29 U.S.C. § 206 (1970).

732. United States v. N.L. Industries, 479 F.2d 359 (8th Cir. 1973). Philip J. Davis, then Acting Director of OFCC, objected to the proposed policy, arguing that it would constitute a "clear shirking of responsibilities under the Executive order." Memorandum to Under Secretary of Labor Richard Schubert and Assistant Secretary of Labor for Employment Standards Bernard DeLury from Philip J. Davis, Director, OFCC (undated).

733. 41 C.F.R. § 60-60.9, Part A, VI B, and Part B, X(c), 39 Fed. Reg. 25657, 25659 (1974).

734. _Id_.

Almost a year later, in March 1975, OFCC published for comment guidelines on relief for affected class members in the form of revised seniority systems and back pay.[735] The proposed guidelines, while containing some deficiencies, were a substantial improvement over the Solicitor's earlier proposal, since they would permit compliance agencies to obtain back pay settlements under the Executive order regardless of whether relief is available under other Federal laws. A major strength of the guidelines was the proposal that relief in the form of revised seniority provisions and back pay be modeled after that provided under Title VII.[736] However, the guidelines failed to provide adequate instructions on the calculation of the amount of back pay due an affected class.[737]

C. Special Guidelines

In addition to setting forth guidelines explaining the affirmative action requirements of the Executive orders, OFCC has also issued a series of guidelines pertaining to special problems relating to the implementation of the order's nondiscrimination clause. There are three special problem areas which have been determined by OFCC to require a definitive treatment beyond the provisions of the orders themselves:

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[735] 41 C.F.R. § 60-9, Affected Class and Back Pay Guidelines, 40 Fed. Reg. 13311 (1975).

[736] Id. The proposed guidelines adopted the "rightful place" theory of seniority relief, which has been widely followed by Federal courts in Title VII cases. See, e.g., United States v. United Papermakers, Local 189, supra note 717. The proposed guidelines failed to take a position on the question of whether lay offs according to seniority are a violation of the Executive order where women and minorities have been discriminatorily excluded in the past and, therefore, denied the opportunity to earn seniority.

[737] The guidelines proposed that in individual cases, the back pay award be based on the amount the individual would have earned but for discrimination. But "less precise" calculations would be appropriate in determining back pay for an entire affected class. Id. at 13313. The guidelines did not indicate that once discrimination has been found against a class, the employer must provide relief to all individuals in the class except those who the employer can show are not entitled to such relief. See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 259-60 (5th Cir. 1974).

employee testing and other selection procedures; sex discrimination; and discrimination based on religious affiliation or national origin. OFCC has issued specific guidelines pertaining to each of these areas.

The Guidelines on Employee Testing and Other Selection Procedures[738] apply to those employment selection criteria which have an adverse effect on the opportunities of minorities or women, in terms of hiring, transfer, promotion, training, or retention.[739] If a test or other selection technique, which is used by the contractor, tends to reject a disproportionate number of minorities or women, then the contractor must have available for inspection empirical data showing that the test is predictive of performance on the job. The OFCC testing guidelines recognize three types of test validation which may be used to show that the test is job related, and they set forth minimum standards which the contractor must meet in developing the study and presenting the evidence of validity.[740] If the contractor presents acceptable proof of a test's job relatedness, the contractor is still not permitted to continue administering the test, unless there are no other tests available which are less discriminatory and which also would be predictive of job performance.[741] OFCC's guidelines do not indicate whether the contractor has the burden of proof in showing that there are no less discriminatory tests; however, EEOC's guidelines state clearly that this responsibility lies with the employer.[742]

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[738] 41 C.F.R. § 60-3 (1974). Testing guidelines were originally issued in 1968 and revised in 1971 following a Supreme Court decision which approved parallel guidelines of the EEOC. 29 C.F.R. § 1607 (1974). Griggs v. Duke Power Co., 401 U.S. 424 (1971). 36 Fed. Reg. 19307 (1971); 29 C.F.R. § 1607.1. The current OFCC guidelines were reviewed and slightly revised again in 1974 in conjunction with the joint agency review of government guidelines on testing, conducted by the Equal Employment Opportunity Coordinating Council. See Chapter 6 of this report for a discussion of this point.

[739] Adverse effect, as used in the context of employee selection, is a differential rate of selection which operates to the disadvantage of a particular class. It is computed by dividing the number of class members selected by the total number of class members who were administered the test and comparing this with a percentage derived in a similar way for the remaining group. For example, a test which rejected 50 percent of minority group applicants but only 10 percent of nonminority applicants would be determined to have an adverse effect if the sample were adequate. 41 C.F.R. § 60-60.9, Part BVB, 39 Fed. Reg. 25658 (1974). The contractor is required to collect and analyze data necessary for determing whether any selection device in use has such an adverse impact. OFCC, Testing and Selection Order Guidance Memorandum No. 8 (July 24, 1974).

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[740] 740. The three types of validation are (1) content validity; (2) criterion-related validity; and (3) construct validity. Content validity is a demonstration that the content of the test replicates the job duties. Tests of skills which the applicant must bring to the job (for example, typing) can be justified on the basis of content validity. Criterion-related validity is a statistical demonstration of a relationship between a test and the job performance of a sample of workers. Intelligence and aptitude tests normally need to be justified by a criterion-related validity study. Construct validity is a demonstration that a test measures a personality trait, such as "integrity," and that the trait is required for the satisfactory performance of the job. Standards for Educational and Psychological Tests, American Psychological Association (APA), 1974. In January 1974. OFCC issued separate and more specific requirements for content validity and criterion-related validity studies, 39 Fed. Reg. 2094 (1974). Specific requirements for demonstrations of construct validity were still under consideration as of July 1974. Davis interview (July 23, 1974), _supra_ note 228.

[741] 741. 41 C.F.R. § 60-3.14 (1974).

[742] 742. 29 C.F.R. § 1607.3(b) (1974). DOL recently wrote that it does not believe that the distinction between the EEOC and OFCC guidelines is substantial. Dunlop letter, _supra_ note 726.

OFCC's Guidelines on Sex Discrimination,[743] issued in 1970, prohibit contractors from stating a sex preference in recruitment advertising; from distinguishing on the basis of sex in employment opportunities, wages, hours, or other conditions of employment; and from restricting one sex to certain job classifications in reliance upon State protective labor laws. The Guidelines also instruct contractors to take affirmative action to recruit women for jobs from which they have previously excluded and give examples showing how such affirmative action might be accomplished. In December 1973, OFCC published for comment proposed revisions in its sex guidelines.[744]

OFCC's 1970 Sex Discrimination Guidelines suffer from four major deficiencies. First, they do not prohibit employers from maintaining mandatory maternity leave policies, which require all pregnant women to leave their employment at a specified stage of the pregnancy, regardless of an individual woman's ability to work. The Department of Justice and the EEOC have taken the position that this type of policy constitutes employment discrimination on the basis of sex.[745] The proposed regulations would eliminate

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743. 41 C.F.R. § 60-20 (1974).

744. 38 Fed. Reg. 35336 (1973). Hearings were held on the proposed revisions in September 1974, 39 Fed. Reg. 27709 (1974), but as of February 1975, no changes in the Guidelines had been adopted.

745. See Brief for The United States as Amicus Curiae, Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). In La Fleur, the Supreme Court held that a school board's maternity policy requiring pregnant teachers to terminate their employment at a set stage of pregnancy violated the Due Process Clause of the Fourteenth Amendment. The policy was not challenged on the basis of Title VII or the Executive orders. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10 (1974).

this deficiency. Second, the Guidelines do not require contractors to provide the same benefits for maternity as they do for other temporary disabilities. EEOC takes the position that policies which single out pregnancy for lesser or different benefits from those afforded other temporary disabilities constitute a violation of Title VII, since pregnancy occurs only among women.[746] The proposed guidelines would correct this deficiency.

Third, OFCC guidelines fail to prohibit contractors from maintaining fringe benefit policies which have a differential effect on persons on the basis of sex. Under OFCC's guidelines, for example, retirement benefits for women may be less than those for men, so long as the contractor's contributions for both groups are equal.[747] The proposed regulations do not unequivocally eliminate this problem. Instead, they offer two alternatives, one which would maintain the status quo and a second which would require contractors to pay equal benefits regardless of the cost to the employer.

Finally, OFCC's guidelines contain frequent reference to the "bona fide occupational qualification" (BFOQ) exception, which permits discrimination on the basis of sex if sex is a BFOQ. Executive Order 11375 does not provide for a BFOQ exception. Moreover, despite judicial precedent narrowly interpreting the exception under Title VII,[748] the 1970 guidelines fail to stipulate that this exception must be strictly construed. The proposed guidelines narrowly construe the BFOQ exception, but fail to place on the employer the burden of establishing a BFOQ.[749]

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[746] 29 C.F.R. § 1604. This position was upheld in Wetzel v. Liberty Mutual Ins. Co., No. 74-1233 (3rd Cir. Feb. 12, 1975). The Supreme Court has not yet ruled on the question whether Title VII or the Executive orders' ban on employment discrimination prohibits the exclusion of pregnancy from employee disability programs. It has, however, held that the Equal Protection clause does not bar a State from excluding such coverage from a State operated disability program for employees of private institutions. Geduldig v. Aiello, 417 U.S. 484 (1974). The only two courts of appeals to rule on the question as of March 1975 have held that the Geduldig decision is not controlling in a Title VII context. Wetzel v. Liberty Mutual Ins. Co., *supra*; and Communications Workers of America v. American Tel. and Tel. Corp., No. 74-2191 (2nd Cir. Mar. 26, 1975). *See also* Holthaus v. Compton & Sons, Inc., No. 74-1655 (8th Cir. Apr. 10, 1975).

[747] EEOC guidelines prohibit such a practice. 29 C.F.R. § 1604 (1974).

OFCC Guidelines on Discrimination Because of Religion or National Origin are directed toward protecting members of various religious and ethnic groups, primarily of Eastern, Middle, and Southern European ancestry.[750] The guidelines outline eight affirmative action measures for increasing the representation of these groups in executive and middle-management jobs. These include special recruitment efforts at educational institutions with substantial enrollments of ethnic and religious minorities, recruitment advertising in media directed at religious and ethnic minorities, review of employment records to determine the availability of members of these groups for promotion, and the establishment of internal procedures to insure that these groups are afforded equal opportunity.[751] The guidelines also spell out the duties of contractors to accommodate the religious observances and practices of employees.[752]

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[748] Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969); and Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

[749] EEOC guidelines place this burden squarely upon the employer. 29 C.F.R. § 1604.4(b)(1974).

[750] 41 C.F.R. § 60-50 (1974). These regulations state that the special problems of other groups, such as Spanish surnamed, Asian, and Native Americans, are covered in the affirmative action regulations. 41 C.F.R. § 60-50.1(d)(1974).

[751] 41 C.F.R. § 60-50.2(b)(1974). Contractors are not required to ascertain the religious beliefs or national origin of employees so long as they can demonstrate that they have undertaken these affirmative action steps. Opinion Letter of Director, OFCC, No. 4227-1, (Nov. 7, 1974).

D. Reporting Requirements

The Executive orders empower the Secretary of Labor to require contractors with Federal contracts including the equal opportunity clause to submit all information and reports concerning their employment policies, programs, and statistics which the Secretary deems necessary for determining compliance with the order.[753] OFCC regulations do not fully implement this grant of authority.[754] The only report which contractors are required to file regularly is one giving the number of employees, by sex, race, and ethnicity, in nine major job categories.[755] This reporting requirement, however, applies to contractors or subcontractors with contracts of $50,000 or more and with 50 or more employees.[756] It also does not apply to any facilities of State and local governments with Federal contracts, except medical and educational facilities of those governments.[757] While the Executive orders stipulate that contractors will take affirmative action to ensure equal opportunity in all of their facilities, OFCC regulations do not require that they file regular reports on the specific affirmative action steps taken, nor do they require contractors on a regular basis to submit even the most essential information for determining whether they are, in fact, taking affirmative action.[758] The regulations require only that contractors make their written affirmative action programs and background data available for inspection by OFCC or an appropriate agency during a compliance review.[759] In 1974, OFCC issued to the compliance agencies uniform review procedures, called Revised Order No. 14, which specify the information contractors must submit when they are the subject of a compliance review.[760] Since contractors generally appear to be subject to reviews only every 14 to 15 years, the importance of interim review reporting requirements cannot be overemphasized.[761]

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[752] Religious colleges and universities are exempted from the Executive orders' requirements with respect to the employment of individuals of a particular religion. See note 707 supra.

[753] Exec. Order No. 11246, Part II, Sec. 203(a), 3 C.F.R., 1964-1965 Comp., p. 341. Applicants for Federal assistance must obtain assurances from construction contractors on federally-assisted projects also to supply all necessary employment data to the Government, 41 C.F.R. § 60-1.4(b)(5)(1974).

[754] DOL recently indicated that it believes that this statement is erroneous. Dunlop letter, supra note 726.

[755] 41 C.F.R. § 60-1.7(a)(1974). This report is submitted annually on Standard Form 100 (EEO-1), which was promulgated jointly by OFCC and EEOC.

[756] 41 C.F.R. § 60-1.7(a)(1974).

[757] 41 C.F.R. § 60-1.5(a)(4)(1974).

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[758] For example, data on wages and salaries, turnover, promotions, and applicant flow, which indicate recruitment efforts, are essential for determining whether good faith affirmative action steps are being taken.

[759] 41 C.F.R. §§ 60-1.40, 60-60.4(c)(1974).

[760] Revised Order No. 14. 41 C.F.R. § 60-60 (1974); and 39 Fed. Reg. 25659 (1974). Revised Order No. 14, which is discussed on pp. 312-28 *infra*, requires contractors under review to submit their written affirmative action program and work force analysis.

[761] For a discussion of the percentage of contractors reviewed annually, see pp. 291-303 *infra*. DOL denies that contractors generally reviewed only every 14 to 15 years. Dunlop letter, *supra* note 726.

E. Sanctions

If a contractor is found not to be complying with the requirements of the equal opportunity clause, as outlined by OFCC rules and regulations, OFCC or the appropriate compliance agency is authorized by the Executive order to impose a range of sanctions, including recommending to the Department of Justice that appropriate proceedings be brought to enforce the Executive order; recommending to the Department of Justice or EEOC that an action be brought under Title VII of the Civil Rights Act of 1964; cancelling, terminating, or suspending any contract or portion of any contract; and debarring the contractor from further government contracts.[762] OFCC regulations prohibit the issuance of an order for cancellation or termination of existing contracts, as well as for debarment from further contracts, without affording the contractor an opportunity for a hearing.[763] A "Notice of proposed cancellation or termination" or a "Notice of proposed ineligibility" must be delivered to the contractor, permitting it 14 days in which to request a hearing. If a hearing is not requested, then the OFCC Director or head of the appropriate agency may cancel or terminate the contract or debar the contractor. If a hearing is conducted, an agency head may not act on the recommendations of the hearing examiner without approval of the Director of OFCC.[764]

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[762] The Executive order permits all of these sanctions, with the exception of debarment, to be imposed without affording the contractor an opportunity for a hearing. Exec. Order No. 11246, Sec. 209, 3 C.F.R. 1964-1965 Comp. 339. This provision of the Executive order was superceded by Section 718 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-17 (1970), *as amended* (Supp. II, 1972) which prohibits the imposition of these sanctions without affording the contractor the opportunity for a hearing, but only if the contractor has an affirmative action program which has been accepted by the government within the previous year. A plan is deemed to have been accepted by the government if it has been accepted by the appropriate compliance agency and OFCC has not revoked approval within 45 days. OFCC regulations require agencies to notify OFCC when an affirmative action plan has been approved, 41 C.F.R. § 60-2.2(a)(2)(1974).

While the Executive order has permitted, since 1965, the suspension of a portion of a contract for noncompliance, OFCC did not officially recognize the withholding of progress payments as an appropriate sanction until April 1973, after it had received an opinion from the Comptroller General of the United States that such a sanction was authorized by the order.[765] OFCC had found that the cancellation and debarment sanctions

> may in certain instances prove too severe for the deficiency found to exist in a contractor's equal employment opportunity posture. Consequently, in some instances where contractor's [sic] violations of the equal opportunity clause were not sufficiently serious to warrant contract cancellation and/or debarment, these deficiencies were not redressed at all by the compliance agency concerned.[766]

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763. 41 C.F.R. § 60-1.26(b)(1974).

764. 41 C.F.R. § 60-1.26(b)(2)(1974).

765. Memorandum to Heads of All Agencies from Philip J. Davis, Acting Director, OFCC, Apr. 2, 1973.

766. Id. In light of the few instances of cancellation and debarment pursuant to the Executive order, the development of alternative, lesser sanctions appears to be an alternative. See Part IV, Section F infra.

Revised Order No. 4 provides for a special procedure which agencies are instructed to follow prior to imposing sanctions on nonconstruction contractors. When an agency finds that a contractor does not have an affirmative action program or has an unacceptable one, the agency is required immediately to issue a notice to the contractor giving it 30 days to "show cause" why sanction proceedings should not be instituted.[767] If the contractor does not develop and implement an acceptable affirmative action program within 30 days of the issuance of the show cause notice, then the agency must immediately issue a notice of proposed cancellation or termination and debarment from future contracts. During the 30-day show cause period, the agency must attempt conciliation with the contractor to persuade it to make the necessary adjustments.[768]

If an agency reviewing a contractor prior to the award of a contract determines that the contractor's affirmative action program does not meet the requirements of Revised Order No. 4, the agency must declare the prospective contractor "nonresponsible," which means that its bid must not be considered. Prior to a declaration of nonresponsibility, the agency must have attempted conciliation with the bidder.[769]

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767. 41 C.F.R. § 60-2.2(c)(1974). See also 41 C.F.R. § 60-60.7 (1974). OFCC regulations applicable to nonconstruction contractors do not require that a show cause notice be issued upon a failure of the contractor to meet its numerical goals. In contrast, construction contractors may be placed under special conditions requiring the issuance of a show cause notice upon such a failure. See Part VI of this chapter.

768. 41 C.F.R. § 60-2.2(c)(1974).

769. 41 C.F.R. § 60-2.2(b)(1974).

F. Labor Unions

The Executive order, although not specifically addressed to labor unions, nonetheless affects them.[770] Each contractor is required to send to each union or workers' representative with which it has a labor contract a notice advising it of the contractor's commitments under the order.[771] The contractor is not required to undertake any actions to ensure that the union does not discriminate, nor must the union accept any obligations. However, a contractor with a collective bargaining agreement is required to show, in its compliance report, how union policies and practices affect the contractor's ability to comply with the order.[772] If a union fails to furnish the necessary information or interferes with the equal opportunity program, the Secretary of Labor may report this to the Justice Department or EEOC and recommend that appropriate proceedings be brought under Title VII of the Civil Rights Act of 1964.[773] OFCC regulations also permit the Director of OFCC to hold hearings concerning the policies or practices of any union.[774]

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[770] The Executive order deals with obligations of Federal contractors, and, therefore, does not speak to the obligations of unions unless they are Federal contractors.

[771] Exec. Order No. 11246, Sec. 202(3), 3 C.F.R., 1964-1965 Comp., p. 340-341.

[772] Exec. Order No. 11246, Sec. 203(c), 3 C.F.R., 1964-1965 Comp., p. 341-342.

[773] Exec. Order No. 11246, Sec. 209(a)(3), 3 C.F.R., 1964-1965 Comp., p. 344.

[774] 41 C.F.R. 60-1.9(c)(1974). OFCC has held hearings only concerning construction unions. See Part VI _infra_ and interview with Doris Wooten, Assistant to the Director, OFCC, July 18, 1974.

III. OFCC Organization and Staffing

A. OFCC's Position in the Department of Labor

When Executive Order 11246 was initially implemented in 1965, OFCC was established in the Office of the Secretary of Labor, thus providing the opportunity for a close link between the OFCC program and the Secretary. However, in 1969 OFCC was transferred from the Office of the Secretary to the Wage and Labor Standards Administration,[775] which subsequently underwent reorganizations and became known as the Employment Standards Administration (ESA). ESA is headed by an Assistant Secretary who directs four separate offices, the Wage and Hour Division, the Women's Bureau, Office of Workers' Compensation Programs, and OFCC. All four office heads serve as Deputy Assistant Secretaries to the Assistant Secretary for Employment Standards, who approves all activities of the four units. The Assistant Secretary is responsible to the Under Secretary; thus, OFCC's position in the organization of the Labor Department is now three steps away from the Secretary. OFCC's activities are also indirectly overseen by the Office of the Solicitor of Labor, which has responsibility for all legal activities of the Department. The Solicitor's Office routinely reviews all OFCC proposed guidelines and regulations and has played an important role in influencing OFCC policies.[776]

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[775] Secretary's Order No. 24-69, U.S. Dept. of Labor, May 19, 1969.

[776] Davis interview (July 23, 1974), supra note 728.

In addition, a reorganization in 1971 abolished OFCC's authority over its field staff and placed it, as well as the field staff from the other three divisions, under the direction of the Regional Administrators for ESA, who reported to the Assistant Secretary through the Office of Field Operations within ESA. In 1973, the Office of Field Operations was abolished and the Regional Administrator was made directly accountable to the Assistant Secretary.[777] OFCC feels that coordination problems have existed since 1971 when it lost its line authority over its regional staff.[778] At the time of the 1971 reorganization, Labor Department officials indicated that the purpose of the consolidation of ESA regional staff was to make available to OFCC other ESA regional personnel;[779] however, personnel from the other field office staffs have been only minimally utilized in contract compliance activities.[780]

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[777] Wooten interview (July 18, 1974), supra note 774. Previously, OFCC field representatives reported directly to the Office of Field Operations in headquarters. In conjunction with the 1973 ESA organizational change, OFCC field representatives were given the title of Assistant Associate Regional Director. Id.

[778] OFCC response to U.S. Commission on Civil Rights questionnaire, 1973 /hereinafter cited as OFCC response/. Davis interview (July 23, 1974), supra note 728. DOL recently wrote that:

> While the reorganization process undoubtedly created a temporary sense of dislocation, most problems have been resolved. The policy guidance on program operations is generated by the Office of Federal Contract Compliance. An operational planning system, formal review and accountability procedures, and ongoing daily contact provide a high degree of National Office-field coordination. Dunlop letter, supra note 726.

[779] Civil rights organizations strongly opposed this reorganization. Interview with Herbert Hill, National Labor Director, National Association For the Advancement of Colored People (NAACP), Mar. 26, 1975. For a more detailed discussion of the 1971 reorganization, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: One Year Later 15 (1971).

B. Budget and Staffing

OFCC requested and was authorized a staff level of 104 persons for both fiscal years 1973 and 1974.[781] As part of a supplemental appropriation request for fiscal year 1974, the Department requested and Congress approved an increase of 26 positions for OFCC bringing the total positions to 130. Twenty of the 26 new positions were assigned to the headquarters office, bringing its total authorized staff to 79 positions. As of the end of fiscal year 1974, however, there were 19 vacancies in headquarters.[782] OFCC was authorized 51 positions in the regional offices, and at the end of fiscal

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780. Staff from other ESA divisions were temporarily assigned to the contract compliance program operations in the spring of 1973, when OFCC began to conduct audits of "hometown" plans in the construction program. (For a discussion of these audits, see Part VI *infra*.) They participated in approximately 42 audits conducted in 1973. Interview with Irving Levine, Director, Office of Field Operations, ESA, Aug. 6, 1973. Davis interview (July 23, 1974), *supra* note 728. As of July 1974, 20 persons from other ESA programs had been assigned for 60 days to assist in conducting additional hometown plan audits. Interview with Robert DiGregorio, Budget and Finance Officer, Budget & Finance Division, ESA, July 25, 1974.

781. Wooten interview (July 18, 1974), *supra* note 774. There are 79 positions located in headquarters and 51 positions located in the regional offices.

782. *Id*. OFCC Staffing Patterns, July 18, 1974.

year 1974, there were seven vacancies.[783] Women and persons of Spanish speaking background are underrepresented in the professional jobs within OFCC; and Asian and Native Americans are underrepresented in both professional and clerical classifications. Males of all groups are underrepresented in clerical jobs.[784]

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783. The distribution of authorized OFCC staff in the regional offices is as follows: Region I (Boston), 2 professionals, 1 clerical; Region II (New York), 5 professionals, 2 clericals; Region III (Philadelphia), 3 professionals, 1 clerical; Region IV (Atlanta), 4 professionals, 2 clericals; Region V (Chicago), 6 professionals, 3 clericals; Region VI (Dallas), 4 professionals, 2 clericals; Region VII (Kansas City), 2 professionals, 1 clerical; Region VIII (Denver), 2 professionals, 1 clerical; Region IX (San Francisco), 5 professionals, 2 clericals; and Region X (Seattle), 2 professionals, 1 clerical. As of the end of fiscal year 1973, some offices actually had more personnel than authorized; the Dallas office had an overage of 3 and the San Francisco office had an overage of 2. Vacancies existed in the following offices: Philadelphia (2), Atlanta (3), Chicago (5), Kansas City (1), and Seattle (1). However, as of the beginning of fiscal year 1974, a total of 20 persons had been detailed for 60 days from other ESA staff to assist OFCC field personnel assigned to auditing hometown plans, DiGregorio interview, supra note 780.

784. As of July 17, 1974, the OFCC Director, Deputy Director, and five Associate Directors were all males. While 34 of the 60 persons (or 56 percent) employed in headquarters were women, only 8 women were employed at the Government Service Grade 11 or above. All of the 26 males were employed at or above this level. There was one Native American employed in headquarters (at the GS Grade 16 level) and three Spanish surnamed Americans (representing 5 percent of headquarters staff); of these three, one was a female non-professional and two were males at the GS 11 level. There were no Asian Americans employed in OFCC headquarters. Of the 21 clericals in headquarters, all were women. Wooten interview (July 18, 1974), supra note 774. OFCC Staffing Patterns, July 18, 1974. Neither OFCC nor ESA could provide information concerning the numbers of minorities and women employed on OFCC's field staffs in fiscal year 1974. Interviews with Glouetta Gaston, Administrative Officer, OFCC, July 23, 1974, and George Henry, EEO Coordinator, ESA, July 25, 1974. However, at the close of fiscal year 1973, OFCC reported that there were no female professionals and no male clerical workers on any of its field staffs. There were seven Spanish surnamed Americans (all males) in field professional positions and no Native or Asian Americans employed in any field office. OFCC response, supra note 777.

The fiscal year 1973 OFCC budget amounted to $2.6 million, but additional Labor Department funds were allocated to the compliance program for the construction industry, through Manpower Administration grants to hometown plans approved by OFCC.[785] In fiscal year 1973, these grants amounted to approximately $6.57 million.[786] For fiscal year 1974, OFCC's budget was increased to $3.1 million, and an increase to $3.7 million was requested for fiscal year 1975.[787]

C. Organization

There have been a number of reorganizations within OFCC's Washington office since its transfer to ESA. Initially, it was subdivided into three offices, each of which had responsibility in one of three areas: monitoring the enforcement programs conducted by the agencies, supervising the OFCC regional staff, and evaluating OFCC policies. Subsequent reorganizations were structured to accommodate the distinction between the compliance program for construction contractors and that for nonconstruction, or supply and service contractors.

Prior to January 1974, OFCC was divided into four offices.[788] The Office of the Director supervised the other three offices and was responsible for overall management functions and miscellaneous projects, such as training and developing an experimental "industry-wide" program focusing on certain industries.[789] The Office of Plans, Policies, and Programs was responsible for developing rules and regulations, interpreting OFCC guidelines, handling complaints, and maintaining an information system. The Office of Construction Operations was responsible for monitoring construction contractors working on Federal or federally assisted projects. In addition to five professional employees in headquarters, all field office personnel during 1973 were assigned to this Office, which resulted in an allocation of 40 persons, or almost 40 percent of the total OFCC staff, to the construction compliance program. While 40 percent of OFCC's human resources were allocated to the construction program, construction workers make up only 10 percent of the total workers protected by the Executive orders.[790] The Office of Non-Construction Operations was responsible for giving technical assistance to Federal compliance agencies in conducting their supply and service contract compliance operations, for conciliating and resolving cases which the agencies could not resolve, and for evaluating the agencies' programs. During fiscal year 1974, agency contract compliance staffs totaled more than 1,700 persons and conducted approximately 21,000 compliance reviews;[791] however, the Office of Non-Construction Operations had only 15 professional and 6 clerical workers to attempt to carry out its responsibility to guide and monitor this large program.[792]

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[785] See Part VII infra.

[786] OFCC response, supra note 777. Data were not available on the amount of these grants in fiscal year 1974. Wooten interview (July 18, 1974), supra note 774.

[787] Wooten interview (July 18, 1974), supra note 774. The budget increases for fiscal year 1974 and 1975 were allocated to staff salaries. Travers interview (July 24, 1974), supra note 685.

[788] OFCC response, supra note 777.

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[789] The selected industry program was handled by one professional on the staff of the Director. Its purpose was to focus on certain industries in which OFCC had identified severe underrepresentation of females and minorities. In late 1973, OFCC staff indicated that the steel, aluminum, banking, insurance, paper, electronic, and chemical industries were identified for the program. During the joint-agency negotiations with the steel industry, OFCC was represented by its staff person handling the selected industry program. Interview with Leonard Bierman, Associate Director, OFCC, July 31 and Oct. 25, 1973; Davis interview (July 23, 1974), *supra* note 728. For a discussion of the joint-agency negotiations and settlement with the steel industry, see chapter 5 of this report *infra*.

[790] Travers interview (July 27, 1973), *supra* note 685. OFCC response, *supra* note 777.

[791] See discussion in Part V *infra*.

[792] As is discussed in Part V, Section C *infra*, OFCC has not adequately monitored the performance of the compliance agencies.

OFCC underwent a major reorganization in January 1974 in order to increase its ability to monitor the supply and service contract compliance program.[793] Four new Agency Compliance Divisions were established and assigned the responsibility for evaluating and monitoring specific compliance agencies. Each Compliance Agency Division is designated two or more compliance agencies for the purpose of evaluating their staffing, regulations, resource allocation, and reports to OFCC.[794] In addition, Compliance Agency Divisions are to perform desk audits[795] of agency com-

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793. See OFCC Organizational Chart at p. 270 infra. The reorganization was adopted on November 16, 1973, but not actually implemented until January 15, 1974. Wooten interview (July 18, 1974), supra note 774.

794. Wooten interview (July 18, 1974), supra note 774. As of July 1974, contract compliance enforcement responsibilities were delegated to 18 Federal agencies. For a listing of agency assignments, see Part V infra. OFCC Agency Compliance Division I was assigned the responsibility for monitoring the Department of Defense (DOD) and the National Aeronautics and Space Administration (NASA); Agency Compliance Division II was assigned the Departments of the Interior and Commerce, the Veterans Administration (VA), and the Atomic Energy Commission (AEC); Agency Compliance Division III was assigned the Departments of Agriculture and Transportation (DOT) and the General Services Administration (GSA); and Agency Compliance Division IV was assigned the Departments of the Treasury and Health, Education, and Welfare (HEW) and the Postal Service and Agency for International Development (AID). Id. Agencies with jurisdiction primarily over construction contractors were assigned to the Construction Compliance Division. These agencies were the Department of Housing and Urban Development (HUD), the Small Business Administration (SBA), the Environmental Protection Agency (EPA), the National Aeronautics and Space Administration (NASA), and the Tennessee Valley Authority (TVA). The Department of Justice (DOJ), which has jurisdiction over State law enforcement agencies receiving Federal contracts, was not assigned to any division. Effective August 1 1974, the compliance responsibilities to AID were transferred to GSA and the nonconstruction contractors of NASA were transferred to AEC and DOD. Memorandum to Heads of All Agencies from Philip J. Davis, Director, OFCC, July 11, 1974. As of July 1974, OFCC had also decided to terminate the compliance responsibilities of the Postal Service but had not determined to which agency they would be referred. Davis interview (July 23, 1974), supra note 728. The OFCC Director indicated that the number of Agency Compliance Divisions might be reduced in light of the consolidation of compliance agency responsibilities. Id.

795. A desk audit is an evaluation of written materials, for example, an affirmative action plan and supporting data, to determine whether the contractor appears, on paper, to be complying with the Executive orders.

pliance reviews and, if necessary, joint compliance reviews with the agencies. Each Compliance Agency Division was authorized seven professional positions and one or two clerical positions; however, as of the beginning of fiscal year 1975, 12 of the total 28 professional positions assigned to these divisions were vacant.[796]

The most recent OFCC reorganization retained the construction compliance program, which is now conducted by the Construction Compliance Division. This Division has responsibility for monitoring all construction contractors covered by the Executive orders and for working directly with the Federal contracting agencies in enforcing the construction compliance program. The construction program, unlike that for supply and service contractors, relies primarily on regional or city-wide plans, called hometown plans, that require cooperation among contractors, trade unions, and citizens' groups to improve the employment of minorities in the local construction industry.[797] The affirmative action provisions of the plans are required to be included in all invitations for bids on Federal or federally-assisted construction projects. The Construction Compliance Division is responsible for ensuring that the Federal agencies include the affirmative action conditions in their invitations for bids, for overseeing the development and implementation of the local plans, for determining whether the plans' minority employment goals are being met, and for supervising the imposition of sanctions where contractors are not in compliance.[798] As of the beginning of fiscal year 1975, the staff of the Construction Compliance Division consisted of six professional and two clerical workers.[799]

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[796] There were four vacancies in Agency Compliance Division I; four vacancies in Division II; two vacancies in Division III (including the Division head); and two vacancies in Division IV. Wooten interview (July 18, 1974), supra note 774.

[797] For a more detailed explanation of the program, see Part VI, Construction Compliance Program infra.

From 1971 to late 1973, OFCC field staff were assigned exclusively to the construction compliance program.[800] In late 1973, OFCC indicated that it was beginning to use its field staff in conducting reviews of supply and service contractor facilities in conjunction with the regional offices of the compliance agencies.[801] In addition to conducting these joint compliance reviews, the field staff also were to review the operations of the compliance agency field staffs. As of July 1974, however, OFCC had reviewed the regional offices of only one compliance agency (NASA) and had conducted only four joint compliance reviews.[802] In its fiscal year 1975

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[798] Interview with William Sims and Glenn Reed, Equal Opportunity Specialists, Construction Compliance Division, OFCC, July 19, 1974.

[799] Wooten interview (July 18, 1974), supra note 774.

[800] OFCC response, supra note 777. Interview with Robert Hobson, Associate Director, OFCC, Oct. 29, 1973.

[801] Hobson interview (Oct. 29, 1973), supra note 800.

[802] Davis interview (July 23, 1974), supra note 728. OFCC conducted only four joint compliance reviews during all of fiscal year 1974. This represented an increase from the one such review conducted in fiscal year 1973. Interview with Robert Hobson, Associate Director, OFCC, July 29, 1973.

Program Plan, OFCC indicated that the field staff would supplement the enforcement activities of the supply and service program by conducting desk audits of agency compliance reports,[803] joint compliance reviews of contractors, and onsite evaluations of agency regional offices.[804] In October 1974, field staff was delegated full responsibility for conducting the OFCC compliance program pertaining to supply and service contractors. Each regional office was instructed to devote 50 percent of its contract compliance resources to this program.[805] Field staff was also to be assigned to assist the construction program by auditing hometown plans and assisting in the development of new plans.[806]

The Office of the Director of OFCC, in addition to providing direction to the entire program, is responsible for preparing reports from the Secretary of Labor to the President on the Governmentwide compliance program and for coordinating with the Office of Management and Budget (OMB) on planning and with other civil rights agencies on policy development and program activities.[807] This Office, which includes six professionals and five clerical workers, is assisted by the Program, Policy and Planning Staff and the Training and Administrative Support Staff.

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[803] A compliance report is a written evaluation by a compliance agency officer of a contractor's affirmative action plan and program. For a more detailed discussion, see Part V infra.

[804] Final draft of the OFCC Program Plan for fiscal year 1975.

[805] Dunlop letter, supra note 726.

[806] Id.

[807] Wooten interview (July 18, 1974), supra note 774. OFCC Staffing Pattern, July 18, 1974.

The Program, Policy and Planning Staff, with eight professionals and four clerical employees, has three principal areas of responsibility: (1) policy development, (2) information management, and (3) resource planning.[808] In the area of policy development, the Staff draws up rules and regulations and outlines policy interpretations and explanations for the public and contractors. For example, it develops and interprets OFCC guidelines on employee selection standards, sex discrimination and special provisions for religious and national origin groups, as well as other special problem areas. Whenever agency compliance officers have questions concerning the adequacy of a testing validation study submitted by a contractor, they must refer the study to the Program, Policy and Planning Staff. As of July 1974, there was only one OFCC staff member qualified to review testing validation studies, and there was a backlog of more than 30 studies awaiting review.[809] The Staff is also in charge of developing policy and procedures governing the conduct of agency compliance programs. For example, it developed a compliance review procedure, called Revised Order No. 14, which was issued in final form to the compliance agencies in February 1974.[810]

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[808] Id. The Program, Policy and Planning Staff performs essentially the same functions as did the Program, Policy and Planning Division prior to the reorganization in January 1974.

[809] Interview with Stephen Bemis, Staff Industrial Psychologist, OFCC, July 26, 1974.

[810] Revised Order No. 14, 41 C.F.R. § 60-60 (1974) is discussed in Part V infra.

Second, the Program, Policy and Planning Staff is responsible for maintaining information systems measuring the performance of the compliance agencies and changes of minority and female employment in the national workforce, as well as the workforce of particular industries or contractors. The Staff has developed a regular reporting system under which agencies are to supply OFCC with information on the number of reviews conducted, the work hours and costs required to complete the reviews, and their staff levels.[811] In addition, a coding sheet has been developed which will enable OFCC to computerize the contractor employment information obtained by agencies during compliance reviews.[812]

Third, the Program, Policy and Planning Staff provides guidance to the compliance agencies on program planning and makes recommendations to OMB concerning the compliance agencies' budgets and staffing levels. The Staff also is responsible for analyzing all data to identify deficiencies in the compliance program and for developing and pilot testing methods of correcting such deficiencies.[813]

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[811] These reports are discussed in Part IV infra.

[812] This coding sheet, which was designed in conjunction with the development of Revised Order No. 14, is discussed in Part V infra. Travers interview (July 24, 1974), supra note 685.

[813] Id. For example, one of the possible deficiencies in the contract compliance program is the system by which contractors are assigned to particular contract compliance agencies. See Part III infra. The Program, Policy and Planning Staff is responsible for evaluating the current system and developing more effective alternatives.

The Training and Administrative Support Staff functions as the Director's liaison with ESA concerning budget, personnel, and other administrative matters.[814] It is also responsible for developing training programs for OFCC and contract compliance agencies' staffs.[815] Finally, this staff controls all OFCC correspondence and processes all complaints filed with OFCC by contractors' employees and applicants.[816] During fiscal year 1974, approximately 458 complaints were filed with OFCC: of these, approximately half were referred to EEOC, and the remainder were referred to compliance agencies.[817] After a compliance agency has investigated and ruled on the validity of a complaint, the complainant is notified of his or her right to appeal to OFCC, but OFCC does not receive a report of the agency's investigation and determination. The failure of OFCC to require the submission of complaint investigation reports by the compliance agencies appears to be in violation of the Executive order.[818] Moreover, in light of EEOC's continuing backlog of outstanding complaints, OFCC should assume responsibility for investigating all complaints filed under the Executive orders. However, in September 1974, OFCC and EEOC signed a Memorandum of Understanding which provides that all Executive order complaints will be referred to EEOC.[819]

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[814] Wooten interview (July 18, 1974), supra note 774.

[815] Id. Compliance agencies have the primary responsibility for training contract compliance personnel. Memorandum to Heads of All Agencies, Transmittal of FY '76 Contract Compliance Planning Guidance Memorandum, from Philip J. Davis, Director, OFCC, May 29, 1974 /hereinafter cited as FY '76 Planning Guidance Memorandum/. OFCC's training consists of seminars, held periodically, for top officials in each of the agencies to discuss particular aspects of the program. Interview with Glorietta Gaston, Training and Administrative Staff, OFCC, July 29, 1974.

[816] Wooten interview (July 18, 1974), supra note 774. The processing of complaints was formerly the responsibility of the Program, Policy and Planning Staff. OFCC response, supra note 777.

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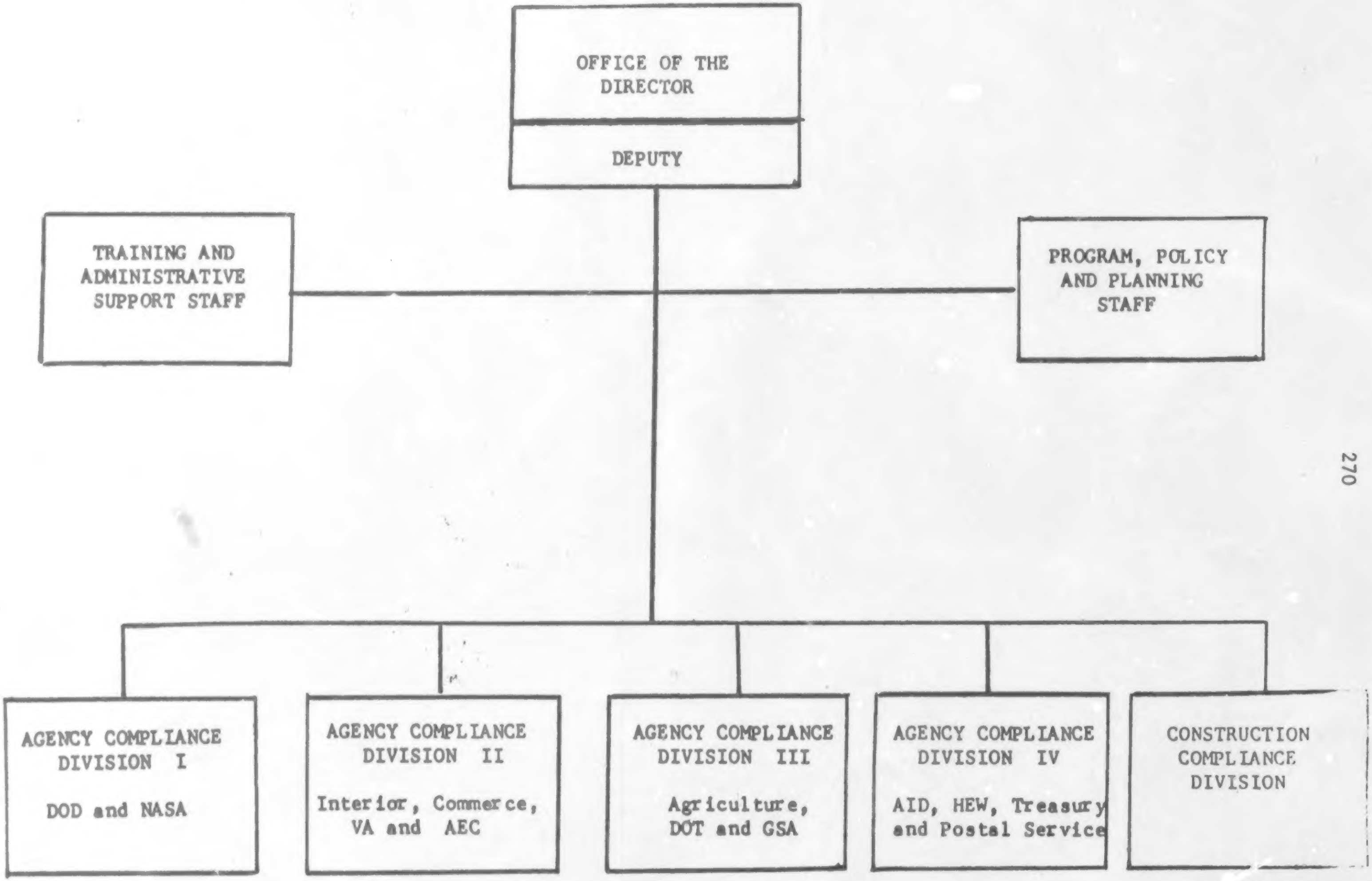
[817] Travers interview (July 24, 1974), supra note 685. Complaints involving class action allegations were forwarded to the appropriate agencies for investigation. Individual complaints, which require specific resolution rather than changes in institutional practices, are usually forwarded to EEOC. Interview with Doris Wooten, Chief, Division of Policy Development, OFCC, July 30, 1973.

[818] Travers interview (July 24, 1974), supra note 685. Section 206(b) of Executive Order No. 11246, 3 C.F.R. 1964-1965 Comp., p. 339, permits the Secretary of Labor discretion to receive and investigate or cause to be investigated complaints. However, if an investigation is conducted for the Secretary by an agency, the agency "shall report to the Secretary what action has been taken or is recommended with regard to such complaints." Id.

[819] Memorandum of Understanding between the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance, John H. Powell, Jr., Chairman, EEOC; Peter J. Brennan, Secretary, Department of Labor; and Philip J. Davis, Director, OFCC, Sept. 11, 1974. 39 Fed. Reg. 35855 (1974). This Memorandum superseded a similar agreement signed on May 20, 1970, which was never fully implemented. For a brief description of the 1970 and 1974 memoranda, see Chapter 6 of this report. For a discussion of EEOC's backlog of charges, see Chapter 5 of this report.


OFFICE OF THE DIRECTOR
DEPUTY
TRAINING AND ADMINISTRATIVE SUPPORT STAFF
PROGRAM, POLICY AND PLANNING STAFF
AGENCY COMPLIANCE DIVISION I
DOD and NASA
AGENCY COMPLIANCE DIVISION II
Interior, Commerce, VA and AEC
AGENCY COMPLIANCE DIVISION III
Agriculture, DOT and GSA
AGENCY COMPLIANCE DIVISION IV
AID, HEW, Treasury and Postal Service
CONSTRUCTION COMPLIANCE DIVISION

IV. The Compliance Agencies: Organization, Resources, and Performance

A. Introduction

The basic structure of the contract compliance program is drawn from Executive Order 11246, which contemplates a program directed by the Secretary of Labor but administered primarily by the contracting Federal agencies. It requires all contracting agencies to establish a compliance program[820] and to prescribe regulations for the administration of the order, subject to the prior approval of the Director of OFCC.[821]

When the program was initiated in 1965, OFCC assigned responsibility to agencies on a "predominant interest agency basis," which meant that the Federal agency whose contracts with the contractor had the largest aggregate dollar value at the time of the assignment became permanently responsible for monitoring that contractor's compliance.[822] In 1969, a different system was developed which assigned compliance responsibility for supply and service contractor facilities on the basis of industry classification.[823] As of August 1, 1974, there were 17[824] Federal agencies which had been designated as "compliance agencies."[825] Responsibility for

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[820] Exec. Order No. 11246, Secs. 205-206, 3 C.F.R. 1964-1965 Comp., pp. 342-343. OFCC is responsible for guiding and evaluating the agencies in the implementation of their compliance programs and the enforcement of the Executive Order. 41 C.F.R. § 60-1.6(b)(c)(e) (1974).

[821] 41 C.F.R. § 60-1.6(b)(c)(e) (1974).

[822] Enforcement Effort report, supra note 691, at 196.

[823] 41 C.F.R. § 60-1.3(d)(1974); OFCC Order No. 1, Oct. 24, 1969.

[824] Until August 1, 1974, there were 18 compliance agencies, but effective that date, the reponsibilities of AID were transferred to other agencies. See Part III, supra note 794.

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[825] Compliance agencies have full responsibility for monitoring the compliance of all contractors within a major industry group or similar responsibility with regard to construction contractors involved in federally-assisted construction projects. Assignment for supply contracts is based on the Standard Industrial Code (SIC) classification used by the Bureau of the Census. Below is a list of compliance agencies and the industry groups for which they have contract compliance responsibility:

Department of Agriculture (DOA)
Agriculture products and services, Food Stores.

Atomic Energy Commission (AEC)
Chemicals, Paints, Synthetics, Plastics, Stone, Clay, Glass, Instruments, and AEC-owned facilities.

Department of Commerce (DOC)
Shipbuilding, Water Transportation.

Department of Defense (DOD)
Textile, Apparel, Printing, Publishing, Leather, Primary Metal, Electrical and Non-electrical Machinery, Motor Vehicles, Aircraft, Business Services, Miscellaneous Manufacturing, Retail Automotive Dealers, Retail Apparel Stores, Retail Hardware, Equipment, and Electrical Supplies, Wholesale Sporting, Photographic and Hobby Goods, Wholesale Electrical books, Wholesale Hardware and Plumbing Supplies, and Wholesale Miscellaneous Durable Goods.

Department of Justice (DOJ)
Public Order and Safety (law enforcement).

Environmental Protection Agency (EPA)
No SIC classification; responsible for construction projects assisted by EPA funds.

General Services Administration (GSA)
Forestry, Lumber and Wood Products, Paper, Furniture, Communication, Electrical, Gas, and Sanitary Services, Real Estate, Holding and Investment Companies, Amusement, Recreation, Personal and Miscellaneous Business Services, Motion Pictures, Auto Repair, Miscellaneous Wholesalers, General Merchandise, Furniture, Appliances, Miscellaneous Retail Stores, Eating and Drinking Places, and consulting and research firms.

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Department of Health, Education, and Welfare (HEW)
Insurance, Other Finance and
Real Estate, Medical and Health
Legal and Educational Services,
Museums, Art Galleries and
Non-profit Organizations, and
Administration of Human Resources Programs.

Department of Housing and Urban Development (HUD)
Administration of Housing and
Urban Development Programs.

Department of the Interior (DOI)
Fisheries, Mining, Petroleum,
Rubber and Plastic, Pipeline
Transportation, Hotels, Tire,
Battery and Accessory Dealers,
and all contractors in the
State of Alaska.

National Aeronautics and Space Administration (NASA)
No SIC classification; responsible for construction
projects assisted by NASA funds.

Postal Service
Railroad and other Transportation
Equipment, Local and Interurban
Transit, Motor Freight, Transportation
and Storage, and Transportation Services.

Small Business Administration (SBA)
No SIC classification;
responsible for construction
projects assisted by SBA funds.

Tennessee Valley Authority (TVA)
No SIC classification;
responsible for construction
projects funded by TVA.

Department of Transportation (DOT)
Shipbuilding, Water
Transportation, Air
Transportation, and Engines and
Turbines, Regulation and
Administration of Transportation

Department of the Treasury
Banking and Savings and
Loan Associations

Veterans Administration (VA)
Biological Pharmaceuticals, Wholesale Drugs.

Memorandum from Philip S. Davis, Acting Director, OFCC, to Heads of All Agencies, Apr. 20, 1973; and Dunlop letter, supra note 726.

construction contractors involved in Federal or federally-assisted construction projects lies with the agency providing the largest dollar value for the construction project.[826]

There may be some disadvantages to the assignment of contractor facilities to agencies on the basis of industry classification. Several different agencies may have responsibility for different facilities of the same corporation. Confusion arises when agencies take different positions with regard to the same corporate-wide employment policy or practice.[827] OFCC recognizes that this problem may exist but feels it is outweighed by the advantage the current system offers in permitting agencies to specialize in the problems of particular industries.[828] It is, however, studying this matter and plans to make recommendations for changes during fiscal year 1975.[829] A second possible disadvantage to the current assignment system is its failure to assure that each compliance agency is aware of all of the government contractors in its industry classification.[830] Employers themselves are responsible for indicating to OFCC whether they are a government contractor.[831] Under the old system, if an employer failed to report its contractor status, the appropriate agency would nevertheless be able to identify the contractor, since the agency's own procurement section would know with which companies it had contracts. However, under the current system, compliance agencies are frequently responsible for many contractors with which they do not have a contractual relationship.[832] OFCC could establish a contractor identification system which would require procurement officers to send a notice to OFCC each time a contract is made. OFCC estimates that this system would cost approximately $2 million per year and feels that the problem is not severe enough to warrant such an expenditure.[833]

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[826] 41 C.F.R. § 60-1.3 (d)(3)(9) (1974).

[827] Interview with James Robinson, Senior Budget Examiner, Civil Rights Unit, Office of Management and Budget, Oct. 9, 1973. For example, RCA's broadcasting subsidiaries are assigned to GSA; but its electronics subsidiaries are assigned to DOD. GSA has taken the position that contractors must take affirmative action to elimimate underutilization of males in traditionally female jobs, but DOD has not. Interview with Dolores Symons, Assistant Deputy Director, Contract Compliance Staff, GSA, Oct. 24, 1973.

[828] Interview with George Travers, Associate Director, Plans, Policies, and Programs, OFCC, Oct. 17, 1973.

[829] *Id.*

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[830] Statement of Gregory J. Ahart, Director, Manpower and Welfare Division, General Accounting Office, Before the Subcommittee on Fiscal Policy, Joint Economic Committee, on the Administration of the Department of Labor's Non-Construction Federal Contract Compliance Program, Sept. 11, 1974 /hereinafter cited as *GAO Report*7. Symons interview, *supra* note 827. The Legal Aid Society of Alameda County (California) has been one of the most aggressive outside organizations interested in the enforcement posture of contract compliance agencies. *See*, *e.g.*, Legal Aid Society of Alameda County v. Shultz, 349 F. Supp. 771 (N.D. Cal. 1972). In 1973, this organization sued the Secretaries of Labor and Agriculture on the ground that the Executive orders were not being adequately enforced. One of the elements of the complaint related to the Department of Agriculture's inability to identify all of its contractors in the Alameda County area. Brief for Plaintiffs, Legal Aid Society of Alameda County v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974). Interview with Steven Ronfeld, Attorney, Legal Aid Society of Alameda County, San Francisco, July 13, 1973.

[831] Employers are required to indicate whether they are a government contractor by checking off the appropriate section of the standard EEO-1 Form, which they are required to submit annually to the EEOC.

[832] Travers interview (July 26, 1973), *supra* note 685.

OFCC regulations require compliance agencies to establish programs for the regular conduct of compliance reviews of the contractor facilities for which they are responsible.[834] Compliance agencies are to conduct "pre-award" reviews of all prospective contractors whose contracts will amount to $1 million or more.[335] Postaward reviews of some contractors are to be conducted according to methods of priority selection approved by OFCC.[836] Preaward reviews constitute approximately seven percent of all reviews conducted.[837] A compliance review, both postaward and preaward, is a comprehensive analysis and evaluation of a contractor's employment practices and affirmative action program.[838] Postaward compliance

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833. Travers interview (July 26, 1973), supra note 685. Subsequently, OFCC determined that a system could be developed at a cost of $355,000. 1975 GAO Report, supra note 726, at 51.

834. 41 C.F.R. § 60-1.20(c)(1974).

835. 41 C.F.R. § 60-1.20(d)(1974).

836. 41 C.F.R. § 60-60.3(a)(1974). OFCC has issued guidelines on selection of contractors for reviews after the award of the contract. See discussion of Revised McKersie System at pp. 283-84 infra.

837. Travers interview (July 26, 1973), supra note 685.

838. 41 C.F.R. §§ 60-1.20(a), 60-60(1974).

reviews must consist of a desk audit of the written affirmative action plan and supporting data, followed by an "on-site" visit to the contractor's facilities.[839] In conducting a preaward review, the agency may omit the desk audit procedure and begin with an onsite review.[840] In addition to conducting regular compliance reviews, agencies are responsible for investigating and resolving all complaints of discrimination referred to them by OFCC.[841]

B. Position of the Compliance Programs within the Agencies

OFCC regulations provide that each agency must appoint a Contract Compliance Officer (CCO) from among executive staff and that the CCO must be "subject to the immediate supervision of the agency head."[842] In most agencies, the executive level person designated as CCO has many responsibilities in addition to administering the Executive orders. Generally, the full-time responsibility for directing the contract compliance program has been given to a CCO's subordinate, who is buried deep in the bureaucracy.[843] Some of the programs are further weakened by

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[839] 41 C.F.R. § 60-60.3(1974).

[840] 41 C.F.R. § 60-60.3(a)(1)(1974).

[841] 41 C.F.R. § 60-1.24(1974).

[842] 41 C.F.R. § 60-1.6(b)(1974).

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843. In 1973, OFCC issued a report evaluating compliance agencies which found the following: AID's program was conducted by the Director of Equal Opportunity Programs, in the office of the agency's Administrator. Agriculture's contract compliance program was carried out by one of three divisions within the Office of Equal Opportunity, whose director reported to the Assistant Secretary for Administration. AEC's Contract Compliance Officer (CCO), who did not work full-time on the contract compliance program, was three steps removed from the Chairman of the Commission. The Defense Department's CCO was responsible to the Deputy Assistant Secretary for Equal Opportunity, who was, in turn, responsible to the Assistant Secretary for Manpower and Reserve Affairs. EPA's Chief of Contract Compliance reported to the Director of the Office of Civil Rights and Urban Affairs, who was immediately under the EPA Administrator. GSA's CCO, who was also responsible for internal equal employment opportunity, answered directly to the GSA Administrator. HEW's contract compliance program was divided; responsibility for compliance in the insurance industry was held by a special staff which reported to the Director of Special Staff, who reported to the Chief of Staff, who reported to the Deputy Assistant to the Commissioner of Social Security; the rest of the contract compliance program was chiefly the responsibility of two divisions within the Office for Civil Rights (OCR), whose directors answered to the OCR Director who reported to the Secretary. HUD's contract compliance program was the responsibility of the Director of the Office of Civil Rights, Compliance and Enforcement, which was under the Assistant Secretary for Equal Opportunity. The Department of the Interior's enforcement of the Executive order was conducted primarily by an Assistant Director for Contract Compliance, who was under the Director of the Office of Equal Opportunity who reported to the Under Secretary. NASA's Equal Opportunity Office was responsible to the Associate Administrator for Organization and Management. The Postal Service's Director of Equal Employment Compliance reported to the Senior Assistant Postmaster General, Employee and Labor Relations, who reported directly to the Postmaster General. SBA's Chief of the Compliance Division was responsible to the Special Assistant to the Administrator and Director of Equal Employment Opportunity and Compliance who reported to the SBA Administrator. TVA's compliance program was conducted by the Chief of the Management Services Staff, who reported to the Director of Purchasing, who reported to the TVA General Manager. DOT's program was carried out within its Office of Civil Rights and also within eight operating Administrations within the Department. The Director of DOT's Office of Civil Rights, who had no authority over the compliance personnel in the operating Administrations, reported directly to the Secretary. The Treasury Department's Director of Contract Compliance reported to the General Counsel. VA's Director of Contract Compliance reported directly to the VA Administrator. "Agency Contract Compliance Program Evaluation for Fiscal Year 1972," Memorandum to Heads of All Agencies from Philip J. Davis, Acting Director of OFCC, Feb. 5, 1973. In May 1974, OFCC instructed agencies to review their organizational structure and current levels of authority and to "take necessary action to avoid undue layering and conflicting program priorities." FY '76 Planning Guidance Memorandum, supra note 815.

having decentralized systems in which the headquarters compliance staffs do not have authority over the compliance staff in regional offices.[844]

C. Compliance Agencies' Staffing and Resources

In fiscal year 1973, agency contract compliance programs employed more than 1,300 persons and operated on a total budget of approximately $28 million. In fiscal year 1974, the total staff level was increased to 1,700 persons and the total budget to $31 million.[845] The contract compliance staff levels and operating budgets vary widely and bear little relationship to the number of contractor facilities for which each agency is responsible.[846] In 1971, during congressional consideration of the removal of OFCC's authority, OFCC indicated to Congress that it had developed a budgeting system unifying the entire contract compliance program "...in light of anticipated requirements and projected workloads...."[847] However, according to this Commission's analysis of information obtained from the Office of Management and Budget and OFCC, in fiscal year 1972, the budget allocation per contractor facility varied from a high of $1,688 (NASA) to a low of $46 (Department of Agriculture). Measured in terms of the number of contractor employees covered by the program, the expenditures ranged from about $2 per contractor employee (Department of Commerce) to less than nine cents (HEW).[848] The authorized staff levels of the agency compliance programs also bore little relationship to the number of facilities for which they were responsible. The number of assigned contractor facilities per agency staff member ranged from 12.5 (NASA) to 357.9 (Department of Agriculture).[849] When compared on the basis of their resources and assigned responsibilities during fiscal year 1972, the agencies ranked in the following order:

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[844] For example, the OFCC study found that the Defense Department's regional contractor compliance staffs reported to the regional Defense Supply Agency Commanders; compliance staffs in NASA centers reported usually through two organizational layers to the center directors; EPA, GSA, and HUD regional compliance staffs reported to the agency regional administrators. The only agencies whose headquarters compliance staffs had direct authority over the regional staffs, according to the OFCC study, were SBA, HEW, Postal Service and VA. Id.

[845] OFCC response, supra note 777. The budget and staff of OFCC are omitted from these figures.

[846] OFCC has not collected information on the exact or estimated number of contractor facilities assigned to each compliance agency. In 1971, the Office of Management and Budget prepared a study of 12 agencies, which included an estimate of the number of facilities assigned to each. According to the OMB information, the number of nonconstruction facilities assigned to each agency ranged from 250 (NASA) to over 20,000 (DOD). The number of workers employed by contractors assigned to each agency ranged from a high of 22 million (DOD) to a low of 240,000 (NASA). Office of Management and Budget, "Brief Discussion Analysis," Dec. 1971 [hereinafter cited as OMB Budget Analysis]. OMB's information was based on estimates given by the agencies at the end of 1971.

[847] Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 996 (1972) [hereinafter cited as Legislative History.]

AGENCIES RANKED IN ORDER OF RESOURCES (Fiscal Year 1972)

Ratio of authorized budget to number of assigned facilities		Ratio of number of facilities to number of authorized staff members	
NASA	$1,688	NASA	12.5
COMMERCE	635	COMMERCE	33.3
DOD	438	DOD	35.9
AEC	301	INTERIOR	63.8
DOT	229	AEC	78.4
INTERIOR	222	HEW	107.8
VA	181	VA	100.0
AID	115	DOT	132.0
HEW	97	AID	137.5
TREASURY	80	TREASURY	195.0
GSA	54	GSA	262.0
AGRICULTURE	46	AGRICULTURE	357.9

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848. See Table A, Appendix of this Section of the report.

849. See Table A, Appendix of this Section of report. Only 12 of the then 18 compliance agencies are listed because OMB collected data on only 12. As of August 1, 1974, NASA and AID were no longer designated as compliance agencies. See note 794 *supra*.

During fiscal year 1973, an even greater disparity in resource allocation was maintained:[850] the level of authorized expenditures per contractor facility ranged from $2,076 (NASA) to $42 (Department of the Treasury). Based on the staff levels authorized by OMB, staff responsibilities ranged from a low of 6.8 contractor facilities per staff member (NASA) to a high of 526.3 (Department of the Treasury). Actual, rather than authorized staff levels are a more accurate yardstick to evaluate agency programs; these data show that staff responsibilities actually ran as high as 1,000 facilities per staff member (Department of the Treasury).[851] Compared on the basis of the ratio of resources to responsibilities, the agencies ranked as follows:

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[850] This Commission obtained from 17 compliance agencies estimates of the total number of construction and nonconstruction facilities for which they are responsible. Some of the agencies (for example, Veterans Administration, Department of the Interior, and Environmental Protection Agency) excluded from their estimates contractors with fewer than 50 employees because these are not subject to the affirmative action requirements and, hence, are not ordinarily subject to reviews. The exclusion of smaller contractors resulted in a total contractor universe (143,337) which was smaller than that estimated by OFCC to make up the total number of facilities covered by the Executive orders. OFCC estimates that there are approximately 275,000 supply and service contractor facilities, of which approximately 90,000 employ more than 100 persons. The number of construction contractors is estimated to be 50,000. Travers interview (July 24, 1974), *supra* note 685. The following analysis of resource allocation among compliance agencies during fiscal year 1973 includes both nonconstruction and construction compliance programs. The analysis of the programs during fiscal year 1972 did not include the construction programs because data were not available on the estimated number of construction facilities assigned to the agencies. The estimates were obtained from the following representatives of each of the compliance programs: Telephone interviews with M. Schiess, Atomic Energy Commission (July 19, 1973); William Gladden, Department of Agriculture (July 19, 1973); Stan Kelley, Agency for International Development (July 19, 1973); John Hennegan, Department of Commerce (July 21, 1973); William Faughanan, Department of Defense (July 17, 1973); E.C. Hunt, Environmental Protection Agency (July 19, 1973); Doris Irving, General Services Administration (July 19, 1973); David Kretchener, Department of Health, Education, and Welfare (HEW) (Dec. 10, 1973); Jack Bluestein, Department of the Interior (Jan. 8, 1974); Doris Warf, Department of Justice (July 30, 1974); Marge Armstrong, National Aeronautics and Space Administration (July 19, 1973); Brenda Ford, U.S. Postal Service (July 29, 1974); Arnold Feldman, Small Business Administration (Sept. 19, 1973); Conwell Jones, Department of Transportation (Sept. 19, 1973); Glenn Wolfe, Department of the Treasury (July 29, 1974); Frank Robinson, Tennessee Valley Authority (Sept. 21, 1973); Willard Wells and Ted Bremmer, Veterans Administration (Jan. 8, 1973); and letter to Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, from Owen Kiely, Contract Compliance Division, Office for Civil Rights, HEW, Oct. 31, 1973.

[851] See Table B, Appendix of this section of the report.

AGENCIES RANKED IN ORDER OF RESOURCES (Fiscal Year 1973)

Ratio of authorized budget to number of assigned facilities		Ratio of number of facilities to actual number of staff members	
NASA	$2,076	NASA	6.8
COMMERCE	1,464	COMMERCE	7.4
HEW	655	DOJ	36.0
INTERIOR	513	AEC	42.4
SBA	390	HEW	46.0
AEC	353	SBA*	45.8*
VA	293	EPA	57.1
EPA	238	TVA	60.0
TVA	233	VA	62.9
DOJ	232	INTERIOR	69.2
HUD	230	DOT	70.2
DOT	216	DOD	124.1
AID	165	AID	122.2
DOD	157	GSA	161.3
GSA	132	HUD	200.0
POSTAL SERVICE	78	POSTAL SERVICE	227.2
AGRICULTURE	43	AGRICULTURE	412.7
TREASURY	42	TREASURY	1,000.0

*Based on authorized staff level figure

D. Planning of Resource Allocation and Program Objectives

The Office of Management and Budget gives final approval to agency requests to Congress for compliance program budgets and is ultimately responsible for coordinating resource allocation in the program.[852] However, OFCC plays a part in the process by making its own recommendations to OMB. Each year, OFCC draws up a Program Guidance Memorandum which outlines the particular industries requiring special attention, the number of compliance reviews which should be conducted, and the budgets and staff levels necessary for carrying out these objectives.[853]

Priority industries for compliance reviews, which are set forth in the Program Guidance Memorandum recommendations, are selected through a process developed by OFCC, called the Revised McKersie System.[854] This System is designed to identify those supply and service industries with the greatest underutilization of women and minorities which also offer the most hiring and promotion opportunities. The Revised McKersie System relies on two basic data sources, the standard EEO-1 Form and average wage data from the Bureau of the Census.

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[852] OFCC response, supra note 777.

[853] Id.

[854] "Revised McKersie System," Memorandum to Heads of All Agencies, from OFCC, Dec. 13, 1972. This System is also to be used by compliance agencies in identifying priorities within their own industry grouping. The Revised McKersie System compares the participation level of females and minorities in each major Standard Metropolitan Statistical Area (SMSA) workforce with the participation level in a given industry workforce within each SMSA. For example, Spanish surnamed Americans might represent 20 percent of the workforce in a given SMSA but only 5 percent of the workforce in all retail stores in that SMSA. The second benchmark calculated is the median wage for minorities and women in a given industry compared with the median wage for all employees in that industry. This ratio is called the "occupation" ratio. Id. For example, in the air transportation industry, blacks' median wages are 84.6 percent of the median wage of all workers. OFCC response, supra note 777.

The Program Guidance Memorandum lists those industry groups which have low participation and occupation levels for minorities and women and which also are believed to have a high proportion of government contractors.[855] Agencies are instructed to focus on those industry groups in scheduling their compliance reviews.[856] For fiscal year 1973, OFCC recommended that 45,000 reviews be conducted;[857] OMB approved a total of 39,000; the agencies actually conducted only 21,823, or 55 percent of the total number of reviews on which their budgets were based.[858] For fiscal year 1974, OFCC recommended a level of 53,234 reviews, but OMB approved only 43,557.[859] However, based on agencies' reports to OFCC, they conducted only 12,247 reviews during fiscal year 1974, or 28 percent of the number on which their budgets were based.[860]

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[855] In the Program Guidance Memorandum for fiscal year 1974, the selected industries listed were: banking; motor freight; electric, gas and sanitary services; air transportation; medical services; food products; drugs; petroleum refining; non-electrical machinery; chemicals; and shipbuilding.

[856] Agencies are required to schedule preaward compliance reviews of all prospective contractors whose contracts will amount to $1 million or more; 41 C.F.R. § 60-1.20(d)(1974); scheduling of other compliance reviews is to be based on priorities indentified by the Revised McKersie System. Memorandum to Heads of All Agencies, from Philip J. Davis, Acting Director, OFCC, Dec. 13, 1972. 41 C.F.R. § 60-60.3(a) (1974).

[857] OFCC response, *supra* note 777.

[858] *Id.*

[859] *Id.*

[860] Tabulation of data obtained from Agency Monthly Progress Reports to OFCC, Travers interview (July 24, 1974), *supra* note 685.

OFCC's recommendations on staffing and budget levels, as well as the number of reviews to be conducted, are based on its evaluations of three types of reports which compliance agencies are requested to file regularly.[861] (1) The Agency Planning Report Form, which is to be submitted annually, requests estimates of costs for carrying out the agency program, the number of reviews planned, the total employment of blacks and persons of Spanish speaking background at the contractor establishments reviewed, and the aggregate of the numerical goals set by these contractors. (2) The Agency Quarterly Operations Report shows the number of compliance reviews scheduled and conducted. (3) The Monthly Progress Report indicates the agency staff level and monthly costs, the number of compliance reviews completed, the number of affirmative action plans reviewed, and the number of show cause notices issued. This report is also designed to show the total employment, minority employment, and goals of all contractors reviewed.

These reports do not collect data on the number of contractor facilities assigned to each agency and, consequently, do not permit a determination whether the agencies' reviews are reaching a significant proportion of the contractors covered by the Executive orders. In addition, it is difficult to understand how OFCC can make adequate recommendations on the number of reviews each agency should conduct and what level of staffing is required without knowledge of the agency's scope of responsibility.[862]

The reports also fail to collect information essential for measuring

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861. OFCC response, supra note 777. Wooten interview (July 18, 1974), supra note 774.

862. The OFCC Planning Guidance Memorandum for Fiscal Year 1976 indicates that OFCC intends to take this factor into consideration in the future FY '76 Planning Guidance Memorandum, supra note 815.

the effect of each agency's program on the employment of women and minorities. No data whatsoever are collected on the level of employment or goals set for females or Asian or Native Americans. Moreover, since data are not collected on the levels of minority employment over time, no comparison can be made with earlier periods to determine whether each agency's compliance program is effecting improvements.

An additional report, in the form of a coding sheet, has been developed for use in conjunction with a new procedure for compliance reviews of nonconstruction contractors.[863] The coding sheet includes a table, called Table Q, which provides for the collection of data on changes in minority and female employment, as well as total employment, at each reviewed contractor. Table Q thus corrects one of the major weaknesses in the old reporting system.[864] The coding sheet is to be completed by the compliance agency and forwarded to OFCC on the completion of each compliance review. This procedure has been required of agencies since January 1973; however, in fiscal year 1974, coding sheets were submitted for less than half of the reviews conducted, and 80 percent of the reports were incorrectly coded.[865]

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[863] This coding sheet is discussed in Part V infra.

[864] However, as will be noted in Part V infra, Table Q is deficient for purposes of enforcement because it does not permit evaluation of the changes in minority and female employment in comparison with the contractor's promised objectives; this is an essential factor in measuring the contractor's good faith effort to comply with the Executive order.

[865] Travers interview (July 24, 1974), supra note 685. In fiscal year 1974, agencies reported that 12,247 compliance reviews were conducted. During that same period, only 5,881 coding sheets were submitted. Id.

In February 1975, OFCC released a report showing Table Q data drawn from coding sheets concerning 655 firms, employing approximately 300,000 people.[866] The report compared the level of employment of minority groups and women, cross-tabulated by race, ethnicity, and sex, at the beginning of each firm's previous affirmative action plan with that existing at the beginning of the current affirmative action plan. The report also projected the level of minority and female employment at the end of the current plan if the established goals and timetables are met. The data indicated that in official and managerial positions the levels of minority and female employment dropped from 4.1 percent to 3.7 percent and from 7.01 percent to 6.81 percent, respectively. Small increases were shown in the level of employment in other job categories. Minorities increased by less than one percent in professional positions and by one to two percentage points in technician, sales worker, and craft workers categories. The percentage of women in sales worker and craft workers positions increased by less than one percent and by one to two percent in professional and technician categories. The OFCC report projected greater increases of minority employment in each of these categories over the current affirmative action plan year but smaller increases of female employment. The report failed to indicate to what extent contractors had met their previously established objectives,[867] which is regrettable since past performance could be an indicator of the performance projected in the OFCC report.

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[866] Memorandum from Philip J. Davis, Director, OFCC, to Heads of All Agencies, Report on Affirmative Action Program Results, Feb. 27, 1975.

[867] The data were not included because Table Q does not collect this important information.

The three agency reports which form the basis of OFCC's planning were implemented in 1970. In 1971, OMB conducted a budget analysis of the contract compliance program and found certain major deficiencies, the chief of which were enormous variation among the agencies in the scale of operations and a failure by OFCC to measure the output of the program.[868] OMB recommended that OFCC analyze the allocation of resources in the program and that it develop means by which to measure the impact of the program in improving female and minority employment. OMB also suggested that OFCC scrutinize the value of the compliance program for the construction industry, since it was receiving a major portion of the resources.[869]

Following OMB's budget analysis, an attempt was made to study the effects of the compliance program on minority and female employment. In June 1972, a study was completed under the auspices of the Department of Labor, which looked at the impact of the nonconstruction compliance program over the years 1967-1970.[870] This report found that the existence of a government contract was cause for an increase of .5 percent in contractors' total black employment; however, the existence of a government contract did not appear to have any impact on the occupational level of blacks.[871]

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[868] OMB Budget Analysis, supra note 846.

[869] At the time, the compliance program for construction accounted for about half of the total resources allocated for implementing the Executive Order; as of fiscal year 1973 that portion had been reduced. See pp. 261-65 supra.

[870] G.R. Burman, "The Economics of Discrimination: The Impact of Public Policy," Report Prepared Under Contract to The Assistant Secretary of Labor for Policy, Evaluation and Research, U.S. Department of Labor, June 30, 1972.

[871] Id. at V-10, V-15.

Similarly, the study concluded that compliance reviews caused an increase of 2.5 percent in the total employment of blacks but did not cause any significant change in the occupational level of blacks.[872] Compliance reviews were found to have had little or no impact on the total employment or occupational status of Spanish surnamed Americans or women; the absence of any impact was attributed to OFCC's emphasis on improving the status of blacks.[873]

A second report, covering the years 1966-1970, concurred in the finding of the earlier report that the relative occupational position of blacks did not increase by a statistically significant amount among government contractors.[874] Neither of these studies considered the impact of the construction compliance program; nor did they look at the impact of the imposition of sanctions.

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872. Id. at V-15. The study found that compliance reviews induced increases in black employment only in the technical, clerical, and service worker occupational categories. Id. at V-22.

873. Id. at V-40, V-51.

874. O. Ashenfelter and J. Heckman, "Changes in Minority Employment Patterns, 1966 to 1970" 37 (January 1973), prepared for the Department of Labor. Black male employment, according to this report, increased at a rate 3.3 percent greater among contractors than non-contractors, Id. at 44. A similar study was conducted by the Office of the Assistant Secretary of Labor for Policy Evaluation and Research (ASPER), but as of February 1975, this report was not available. Preliminary analysis of the data in the ASPER study indicated that female employment among government contractors had actually worsened as of 1972.

OMB's budget analysis also recommended that OFCC conduct a thorough evaluation of the allocation of resources within the compliance program. As a result, OFCC conducted its first study of each of the agency compliance programs.[875] The study considered the position of the program within each agency, the composition of the personnel on the compliance staffs,[876] and the compliance review procedures followed by each program.[877] However, the study ignored the need for an analysis of the agency responsibilities compared with their levels of resources. Staff increases were recommended for the Departments of Commerce (Commerce); Defense (DOD); Health, Education, and Welfare (HEW); and the Treasury. Two of these (Commerce and DOD) were relatively better-staffed agencies during 1972, according to this Commission's analysis.[878] Nor did the study consider whether better funded agencies were able to review more of their assigned contractor facilities or whether the compliance reviews of some agencies had greater impact on minority and female employment than reviews of other agencies.

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[875] Agency Contract Compliance Program Evaluation for Fiscal Year 1972, Memorandum to Heads of All Agencies, from Philip J. Davis, Acting Director, OFCC, Feb. 5, 1973.

[876] OFCC found that women and minorities were underrepresented in some of the agencies' compliance staffs. Asian and Native Americans were underrepresented on the staffs of DOD, AEC, and HUD. Women, according to OFCC, were underrepresented in professional jobs in the compliance programs of AID, Agriculture, DOD, EPA, HEW, HUD, SBA, Treasury, and VA. At the Department of Agriculture, for example, the average grade of white and black males was 11.5; the average grade of all females was 6.2.

[877] A description of OFCC's findings concerning the agencies' compliance review procedures is given in note 948 infra.

[878] See p. 280 supra.

E. Performance

Since the Department of Labor studies[879] indicate that compliance reviews cause an improvement in minority employment,[880] presumably the agencies which review a greater portion of their assigned contractor facilities have a greater impact. According to this Commission's analysis, the better-funded compliance programs tend to review a greater portion of their assigned contractor facilities. As the following table shows, in 1972, NASA, which had the best funded program,[881] was the only agency which reviewed more than half of the contractor facilities for which it was responsible. The more poorly-funded agency programs (Agriculture, GSA, Treasury, HEW, and AID)[882] reviewed less than 10 percent of the contractor establishments under their jurisdiction.

AGENCIES RANKED ACCORDING TO THE PERCENTAGE[883]
OF ASSIGNED CONTRACTOR FACILITIES REVIEWED (Fiscal Year 1972)

NASA	75.2%
VA & DOD	45.3%
DOT	37.4%
COMMERCE	29.4%
INTERIOR	11.6%
GSA	9.1%
AID	8.2%
AEC	7.5%
TREASURY	6.4%
HEW	5.4%
AGRICULTURE	2.9%

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879. See pp. 288-89 supra.

880. As previously noted, the Burman study attributed the absence of an impact on female and Spanish surnamed American employment to OFCC's emphasis on black employment. Presumably, if the emphasis were changed, compliance reviews would also have an impact on non-black minority and female employment.

881. See p. 280 supra.

882. Id.

883. See Table A in the Appendix to this Chapter.

In 1973, the relatively better staffed agency programs were again able to conduct compliance reviews of a larger percentage of their assigned facilities.[884] As the following table shows, only three agencies (NASA, EPA, and Commerce) reviewed more than 40 percent of their contractor facilities. Six agencies (Interior, HEW, AID, Postal Service, Treasury, TVA, and Agriculture) reviewed less than 10 percent of their assigned facilities during 1973.

AGENCIES RANKED ACCORDING TO THE PERCENTAGE OF ASSIGNED CONTRACTOR FACILITIES REVIEWED (Fiscal Year 1973) [885]

	[886]
NASA	106.0%
EPA	82.4%
DOC	51.0%
GSA	20.6%
DOT	18.7%
DOD	18.2%
VA	17.7%
HUD	16.2%
AEC	12.6%
INTERIOR	7.5%
HEW	6.4%
AID	5.0%
POSTAL SERVICE	4.0%
TVA	3.3%
TREASURY	2.1%
AGRICULTURE	1.1%

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[884] There were some notable exceptions to this pattern, however, HEW, for example, had the fifth best staffing ratio but failed to review more than 6.4 percent of its facilities. See p. 282 supra.

[885] See Table B, Appendix to this section, SBA and DOJ are not included in this table because those agencies failed to report to OFCC the number of facilities they had reviewed during fiscal year 1973.

[886] NASA conducted a greater number of reviews than the number of its assigned contractor facilities; apparently this was caused by reviewing some contractors more than once.

Despite OMB's budget analysis findings in 1971 and the vast differences in agencies' performances during 1972 and 1973, OFCC permitted the agencies' authorized staff levels and budgets for fiscal year 1974[887] to reflect the same wide variation in resource allocation which had existed in the two previous years:

AGENCIES RANKED IN ORDER OF RESOURCES (Fiscal Year 1974)[888]

Ratio of authorized budget to number of assigned facilities		Ratio of number of facilities to number of actual staff members	
NASA	$2,136	NASA	8
COMMERCE	1,734	COMMERCE	12
HEW	788	HEW	26
SBA	583	SBA & TVA	30
AEC	459	DOJ	43
DOJ	426	AEC	46
INTERIOR	397	VA	58
TVA	350	INTERIOR	59
VA	296	DOT	64
EPA	285	HUD	80
DOT	226	POSTAL SERVICE	85
HUD	214	DOD	88
AID	197	GSA	106
DOD	176	AID	109
GSA	157	EPA	142
POSTAL SERVICE	78	AGRICULTURE	371
AGRICULTURE	43	TREASURY	542
TREASURY	41		

As in prior years, the agencies with proportionately smaller workloads and larger budget authorizations were more likely able to review the employment practices of a larger portion of their contractors and hence have a greater

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887. See Table C, Appendix

888. See Table C, Appendix

impact on increasing job opportunities for minorities and women.[889]

AGENCIES RANKED ACCORDING TO THE PERCENTAGE OF ASSIGNED CONTRACTORS REVIEWED (Fiscal Year 1974)[890]

NASA	48.8%
COMMERCE	38.4%
TVA	31.6%
DOT	15.2%
AEC	14.2%
EPA	13.6%
HUD	13.4%
GSA	12.6%
INTERIOR	12.4%
DOD	7.6%
VA	6.7%
HEW	5.7%
AID	4.0%
AGRICULTURE	3.0%
TREASURY	2.0%

While a few agencies are currently able to investigate their assigned contractors once every two or three years, others have the capability of reviewing their contractors only once every 10 years, or even more infrequently. Altogether, compliance agencies reviewed approximately 7 percent of construction and supply and service contractors during fiscal year 1974.[891] At this rate, a contractor is subject to review only once every 14 to 15 years. This results in unfairness to employees in industries covered by the less productive agencies and unfairness to contractors.

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[889] One of the notable exceptions to this pattern was HEW, which ranked third highest in resources but fourth lowest in the percentage of contractors reviewed.

[890] DOJ, SBA, and the Postal Service are not included because these agencies did not report the number of reviews conducted. See Table C, Appendix.

[891] See Table C in the Appendix.

F. Enforcement Posture of the Compliance Agencies

Under the Executive orders and OFCC regulations, compliance agencies may impose three types of sanctions: (1) prohibiting the award of a contract to a bidder, (2) cancellation or termination of existing contracts or debarment from additional contracts, and (3) withholding of progress payments.[892]

If the preaward review, which is required of all bidders on contracts of $1 million or more,[893] reveals deficiencies in the company's employment practices, then the compliance agency must request the contracting agency to delay award of the contract until the bidder develops an affirmative action plan to correct the deficiencies.[894] From 1965 to 1971, according to OMB, compliance agencies requested delay of contract awards in only 10 or 12 instances.[895] OFCC does not know how many such request have occurred since 1971,[896] or how many occurred during any fiscal year.[897]

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892. See Part II of this report supra.

893. 41 C.F.R. § 60-1.20(d)(1974).

894. 41 C.F.R. § 60-2.2(c)(1974).

895. OMB Budget Analysis, supra note 846.

896. Interview with Robert Hobson, Associate Director, Nonconstruction Operations, OFCC, Oct. 29, 1973.

897. Wooten interview (July 18, 1974), supra note 774. There is some evidence that agencies fail to comply with OFCC regulations requiring preaward reviews. In an investigation of 84 Federal contracts, each exceeding $1 million, GAO found that almost 30 percent had been awarded without a preaward review. 1975 GAO Report, supra note 726, at 35-6 and 49-50.

Once a contract has been awarded, the contractor may be selected for review if a complaint has been filed by one of its employees, if its employment records indicate that its workforce suffers from underutilization of women and minority workers,[898] or if the compliance agency wishes to conduct a followup review to verify that the contractor is abiding by the promises it made previously. When an agency finds that an affirmative action plan is not acceptable or that the contractor is not following its plan, the agency is required to issue a notice to the contractor, requiring it to show cause, within 30 days, why proceedings should not be instituted. During the 30-day period, the agency is required to negotiate with the contractor to resolve the deficiencies.[899]

The show cause notice, in effect, shifts the burden of proof to the contractor to show that it is in compliance. Since this notice is the preliminary step to sanction proceedings, OMB has determined that the issuance of show cause notices is a possible indicator of agencies' commitment to standards of strict enforcement.[900] OMB found that agencies tended to issue show cause notices to about 2 percent of the contractors reviewed in 1971.[901] In fiscal year 1972, this same rate was maintained.

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[898] Agencies have been instructed by OFCC to investigate the employment practices of a selected number of their total contractor facilities; the means of selection is the Revised McKersie System, explained on pp. supra.

[899] See Part II of this report supra.

[900] OMB Budget Analysis, supra note 846.

[901] Id.

Agencies conducted approximately 20,839 reviews and issued 404 show cause notices. In fiscal years 1973 and 1974, the issuance of show cause notices increased slightly. Out of 21,825 contractors reviewed in fiscal year 1973, 698 (or 3.2 percent) received show cause notices.[902] During fiscal year 1974, 3.6 percent of reviewed contractors received such a notice.[903] The agencies varied widely in the frequency with which they issued show cause notices.[904] For example, in fiscal year 1974, DOD issued such a notice to 16.7 percent of the contractors it reviewed, while three of the agencies issued no notices at all. There does not appear to be any relationship between the staffing or budget levels of the agencies and the frequency with they issue show cause notices.[905]

Although OFCC regulations require agencies to issue a show cause notice prior to negotiating with the contractor for corrections of violations, it appears that many agencies issue such notices only after protracted negotiations have broken down. AEC, for example, does not issue a show cause notice upon finding that a contractor has failed to develop an affirmative action plan,[906] although OFCC regulations clearly require such action.[907] GSA does not take any action other than negotiating upon finding that a contractor has failed to prepare a utilization analysis or goals and timetables. Only if the contractor repeatedly refuses to comply with the regulations does GSA issue a show cause notice.[908] HEW follows a similar practice,[909] as do the Departments of Commerce and the Treasury.[910]

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[902] OFCC, Summary of Monthly Progress Reports, FY 1973; See Tables A, B, and C in Appendix for a listing of the number of show cause notices issued by each agency.

[903] Out of 12,247 contractors reviewed, 444 (3.6 percent) received show cause notices. See Table C, Appendix. In its review of DOD and GSA compliance programs, GAO found that 48 percent of the show cause notices issued by DOD and 33 percent or more issued by GSA were in response to a contractor's failure to prepare or update a written affirmative action plan. 1975 GAO Report, supra note 726, at 26.

[904] See Table D in the Appendix to this chapter.

[905] On the hypothesis that more thorough reviews would both cost more and also be more likely to lead to a show cause issuance, this Commission compared the average cost per review, by agency, with the percentage of contractors issued a show cause notice. There did not appear to be a relationship between the approximate amount spent by each agency on a compliance review and the issuance of show cause notices. Id.

If the contractor's response to the show cause notice is inadequate, the compliance agency is required to issue a notice of proposed debarment, allowing the contractor 14 days in which to request a hearing.[911] As of February 1975, only nine companies had been debarred in the 10 years since the Executive Order was issued. The first contractor was debarred in 1971, 2 days after the introduction of legislation proposing to remove OFCC's authority.[912] Six of the nine debarred companies were small specialty construction contractors. The first nonconstruction contractor, which was

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906. Deposition of Armin Behr, Assistant Director, Contract Compliance, AEC, Dec. 2, 1974, in Legal Aid Society of Alameda County v. Brennan, supra note 830. According to Mr. Behr, a show cause notice is issued only after initial conciliation fails.

907. 41 C.F.R. 60-2.2(c)(1974).

908. Deposition of Betty A Mulholland, Assistant Director, Contract Compliance, Region IX, GSA 70-71, Sept. 27, 1973, in Legal Aid Society of Alameda County v. Brennan, supra note 830.

909. U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity 275-305 (January 1975).

910. GAO Report, supra note 830. See also 1975 GAO Report, supra note 726, at 27-9.

911. 41 C.F.R. § 60-2.2(c)(1974).

912. Legislative History, supra note 847, at 439.

debarred in August 1974, was also a small employer.[913] Three of the nine companies had been reinstated as of February 1975.[914] No notices of proposed debarment were issued during fiscal year 1974 and only two had been issued during the first half of fiscal year 1975.[915] The withholding of progress payments was authorized in April 1973, but as of February 1975 this sanction had never been used.[916]

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[913] The companies and dates of debarment were as follows: Edgely Air Products, Levittown, Pa. (Sept. 17, 1971); Randeb, Inc., Newton Square, Pa. (Mar. 7, 1972); Russell Associates, Philadelphia, Pa. (Aug. 29, 1972); McNikol-Martin Co., Clarksburg, W. Va. (Mar. 1973); Harry Myhre, Harrisburg, Pa. (March 27, 1974); Dial Electric Co., Denver, Col. (Nov. 10, 1973). Memorandum to Heads of Agencies from Philip J. Davis, Acting Director, OFCC, Mar. 23, 1973. Telephone interview with Philip J. Davis, Director, OFCC, Jan. 8, 1974; Wooten interview (July 18, 1974), _supra_ note 774; Sims and Reed interview (July 19, 1974), _supra_ note 798. A nonconstruction contractor, Hesse Envelope Company of Dallas, Texas, was debarred on Aug. 8, 1974. Memorandum to Heads of Agencies, from Philip J. Davis, Director, OFCC, Aug. 8, 1974. In October 1974, two additional nonconstruction contractors were debarred, Blue Bell, Inc., a clothing manufacturer in Greensboro, N.C.; and Dibert, Bancroft, and Ross, a metal working company in Amite, La. Department of Labor News Release No. 74-644 (Nov. 25, 1974).

[914] Edgely Air Products and Russell Associates were reinstated on March 23, 1973; Dial Electric was reinstated on May 16, 1974. Sims and Reed interview (July 19, 1974), _supra_ note 798, and telephone interview with Doris Wooten, Special Assistant to the Director, OFCC, Feb. 26, 1975.

[915] Wooten interviews (July 18, 1974), _supra_ note 774, and (Feb. 26, 1975) _supra_ note 914.

[916] Wooten interview (Feb. 26, 1975), _supra_ note 914.

V. Supply and Service Program

A. Introduction

In fiscal year 1973, over $100 billion in Federal contracts for goods and services were awarded to approximately 275,000 companies and institutions.[917] These supply and service contractors employed the vast majority of workers protected by the Executive orders.[918] The heart of the nonconstruction program is the review of affirmative action plans and the performance of contractors in meeting the objectives of the plans. In fiscal year 1973, the compliance agencies conducted reviews of approximately 19,000 facilities of supply and service contractors and their affirmative action plans and found more than 70 percent of these in compliance with the Executive orders.[919] Approximately $20 million was spent to run this program.[920] In fiscal year 1974, the cost of the program went up by $5 million but the level of activity decreased. Approximately 12,000 contractors (or 4 percent) were reviewed and 86 percent were found to be in compliance.[921]

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[917] Council of Economic Advisors, Economic Indicators 37 (June 1974); Travers interview (July 24, 1974), *supra* note 685.

[918] Travers interview (July 24, 1974), *supra* note 685.

[919] Approximately 19,000 of approximately 22,000 reviews conducted were reviews of supply and service contractors. Approximately 14,000 of these (or 78 percent) resulted in the approval of affirmative action plans. OFCC response, *supra* note 777; and see Table B of the Appendix to this chapter. The compliance status of the other 22 percent remained ambiguous; only 3.2 percent received show cause notices and none received any sanctions. OFCC Summary of Monthly Progress Reports, Fiscal Year 1973.

[920] OFCC response, *supra* note 777. An additional $8 million was spent on the construction program, which is discussed in Part VI *infra*.

[921] There were 12,247 compliance reviews conducted in fiscal year 1974, of which approximately 11,000 pertained to supply and service contractors. Approximately 9,500 of these reviews (or 86 percent) concluded in approval of affirmative action plans. See Table C of the Appendix of this chapter.

OFCC regulations direct contractors to begin the development of an affirmative action plan with an analysis of their work force to determine whether women and minorities are underutilized in any job titles.[922] This self-analysis should include a table of job classifications showing job titles, principal duties, and rates of pay.[923] The evaluation must analyze the representation of minorities and females in each job title appearing in payroll records or collective bargaining agreements,[924] the hiring, promotion, and transfer practices for the preceding year,[925] and the number and race, ethnicity, and sex of all job applicants.[926] Further, the contractor is to evaluate testing and other selection standards, to determine if they adversely affect minority or female utilization.[927] If underutilization of females or minorities exists, then the contractor must develop goals for eliminating underutilization within a reasonable time, in each job title.[928] Goals should be based on the availability of minorities and women in the workforce area in which the contractor is located.[929] In developing its affirmative action plan, the contractor should set intermediate, annual objectives for hiring and promoting women and minorities.[930] The intermediate objectives should be based on the number of hiring and promotion opportunities (created by turnover and company growth) and should enable the company to reach its ultimate goals within a reasonable time if they are met. Finally, the contractor is required to determine whether there is an affected class problem and to provide relief to those included in the affected class.[931]

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[922] 41 C.F.R. § 60-2.11(1974).

[923] 41 C.F.R. § 60-1.40(1974).

[924] 41 C.F.R. § 60-2.23(a)(1)(1974); 41 C.F.R. § 60-1.40(b)(1)(1974); 41 C.F.R. § 60-2.11(a)(1974).

[925] 41 C.F.R. §§ 60-1.40(b)(2)(3)(1974); 41 C.F.R. §§ 60-2.23(a)(4),(6)(1974).

[926] 41 C.F.R. § 60-2.23(a)(2)(1974).

[927] 41 C.F.R. § 60-2.23(a)(3)(1974); 41 C.F.R. § 60-1.40(b)(1974).

[928] 41 C.F.R. § 60-2.12(1974).

OFCC regulations direct compliance agencies to conduct regular compliance reviews to determine if contractors are taking affirmative action.[932] When an agency approves a contractor's affirmative action plan, it must notify OFCC.[933] Under Section 718 of the Equal Employment Opportunity Act of 1972,[934] OFCC has

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929. Some guidelines on determining availability of women and minorities are contained in Revised Order No. 4, supra note 713. In addition to the contractor self-evaluation and goals and timetables, the affirmative action plan must include additional ingredients, such as development and dissemination of an equal opportunity policy, the establishment of responsibilities for implementing the affirmative action plan, internal audit and reporting systems, and identification of possible discriminatory practices in each organizational unit. 41 C.F.R. § 60-2.13; 2.20-2.25(1974).

930. 41 C.F.R. § 60-60.9, Part B XII B(1)(c), 39 Fed. Reg. 25660 (1974). Technical Guidance Memo on Revised Order No. 4, supra note 713. See also Legal Aid Society of Alameda County v. Brennan, supra note 830. While OFCC has instructed compliance agencies that intermediate objectives must be set, this requirement has not been specified in Revised Order No. 4, which is directed to contractors.

931. 41 C.F.R. § 60-2.1 (1974). The concept of affected class is discussed in Part II supra.

932. 41 C.F.R. §§ 60-1.20(a), 60-60.3(a)(1974).

933. 41 C.F.R. § 60-2.2(a)(2)(1974). Notification must be made by submitting a coding sheet to OFCC within 60 days after the compliance agency has received the contractor's affirmative action plan. 41 C.F.R. § 60-60.7(c)(1974).

934. 42 U.S.C. § 2000e-17 (1970), as amended (Supp. II, 1972).

45 days in which it may revoke approval of an affirmative action plan.[935] In addition, OFCC may, at any time, intervene in the compliance review process and assume jurisdiction over a contractor when it believes that a compliance agency is not adequately enforcing the Executive orders.[936]

The frequency with which agencies approve affirmative action plans, coupled with the low level of show cause and debarment notices and the fact that only one supply or service contractor has ever been debarred,[937] may imply to some that these contractors are generally developing and maintaining meaningful affirmative action plans capable of eliminating underutilization of minorities and women within a reasonable period of time. Unfortunately, as subsequent discussion will show, the small amount of information available from OFCC indicates that, in fact, agencies are giving approval to grossly deficient affirmative action plans. This may be due to OFCC's failure to provide adequate guidance to the agencies and to monitor their performance.

B. OFCC Guidance to the Compliance Agencies on the Conduct of Compliance Reviews

In 1971, Revised Order No. 4 established the basic requirements for an affirmative action plan and provided instructions to the compliance agencies on the procedures to follow if the contractor had no plan or an unacceptable one or if the contractor had deviated substantially from an approved plan. However, Revised Order No. 4 did not include instructions to the compliance agencies on the procedures to follow in evaluating and reviewing an affirmative action plan or the contractor's actual employment practices. In light of the requirements of Revised Order No. 4, a compliance review should have three basic purposes: (1) to determine the adequacy of the contractor's affirmative action program goals; (2) to determine whether the contractor has made good faith efforts in meeting its previous goals; and (3) to determine whether adequate relief has been provided to members of an affected class. Although Revised Order No. 4 was issued in 1971, OFCC gave no adequate guidance to the agencies on conducting compliance reviews until 1974. Compliance review procedures issued in 1974, while eliminating much confusion, failed to assure that compliance reviews would fulfill the latter two of the three essential purposes.

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[935] 41 C.F.R. § 60-2.2(a)(1974).

[936] 41 C.F.R. § 60-1.25(1974).

[937] See note 931 *supra*.

Until 1974, agencies were issued adequate instructions concerning the method of collecting information from the contractor.[938] In 1974, Revised Order No. 4 was altered and new regulations were issued which make clear that contractors must submit, for offsite review, copies of their affirmative action plans and supporting documentation, including the workforce analysis.[939]

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[938] Until 1974, OFCC regulations were ambiguous concerning the extent to which compliance agencies had the authority to request contractors to submit data for review off the premises of the contractor. Revised Order No. 4 (41 C.F.R. § 60-2.12(m)(1974)), simply required that copies of the affirmative action plan and support data "shall be made available at the request of the compliance agency or OFCC." Another part of OFCC regulations, 41 C.F.R. § 60-1.43(1974), implied that contractors were required only to make records available on their premises. DOL contends that it had regulations covering this point since January 1972. Dunlop letter, supra note 726. This Commission, however, does not believe DOL's earlier regulations provided sufficient guidance.

[939] 41 C.F.R. § 60-60.3(a), 39 Fed. Reg. 5630 (1974).

In January 1975, OFCC circulated a draft Handbook on Federal Contract Compliance, which merely summarized compliance agency responsibilities under previously issued directives.[940]

In 1974, OFCC also issued for the first time guidelines to compliance agencies on evaluating the contractor's work force analysis and goals to eliminate underutilization. In a memorandum issued in February 1974 and revisions to Revised Order No. 4 issued in July 1974,[941] OFCC stated that a work force analysis must list each job title and line of progression through which an employee can move to the top job in each department or unit; for each job title, there must be a listing of the total employees, crosstabulated by race, ethnicity, and sex; and the wage rate or salary range for each job title must be given. For the purpose of analysis, the compliance agency officer may group job titles with similar content, wage rates, and opportunities. In determining the availability of females and minorities, the compliance reviewer is instructed to refer to manpower data provided by local employment security agencies[942] and, in addition, to consider the number of minorities and females who would be available through training and intensive recruitment.[943] The availability of females and minorities must be separately analyzed for each job group. The memorandum also explains that a goal must be established for each job group in which underutilization exists and must be designed to correct completely the underutilization. The ultimate goal must be stated as a percentage of the total employees available for the job group in the relevant labor market.[944] In addition, annual objectives must be set for hiring and promoting the underutilized group; these rates must not be lower than the percentage rate set in the ultimate goal.[945]

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[940] Memorandum from Philip J. Davis, Director, OFCC, to Heads of All Agencies (Jan. 23, 1975).

[941] Technical Guidance Memo. No. 1 on Revised Order No. 4, supra note 713; 41 C.F.R. § 60-2, 39 Fed. Reg. 25654 (1974).

[942] These data are provided in "Manpower Information for Affirmative Programs," a report which each State Employment Security Division must prepare and maintain. U.S. Department of Labor, Manpower Administration, Reports and Analysis Letter No. 816 (Aug. 28, 1973). These data show the current occupational status of minorities and women in the laborforce, and thus cannot provide the only basis for determining availability, since many minorities and women are currently in particular occupations because of discriminatory placement practices.

[943] Technical Guidance Memo. No. 1 on Revised Order No. 4, supra note 713.

While OFCC has begun to issue some guidelines clarifying the requirements of Revised Order No. 4, as of February 1975, it had still not issued adequate instructions concerning the evaluation of the contractor's performance in meeting its goals[946] or on the minimum level of affected class relief required to be provided before an affirmative action plan should be approved and the contractor found in compliance.[947] As a result of these omissions and the long delay in issuing any instructions on compliance reviews, many of the compliance agencies had developed their own procedures.[948]

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[944] 41 C.F.R. s 60-60.9, Part B XII B(1)(c), 39 Fed. Reg. 25660 (1974). No instructions have been issued concerning the definition of the relevant labor market. As a consequence, some contractors have apparently been permitted to choose a definition that excludes minority populations. See Legal Aid Society of Alameda County v. Brennan, *supra* note 830.

[945] Technical Guidance Memo. No. 1 on Revised Order No. 4, *supra* note 713.

[946] A proper evaluation of an employer's performance in obtaining its goals must include an analysis of turnover, expansion or contraction of the contractor's workforce, and recruitment. For example, if a contractor has no black female employees in an entry-level job category and sets a goal of having 10 percent black females in that category within 5 years, it is not necessarily true that the contractor has made reasonable progress if at the end of the first year it employs 2 percent black females in that job; turnover could have been such that the employer could have met its goal for black females in the first year. OFCC has not provided adequate instructions to the agencies to clarify the technical problems involved in properly evaluating the contractor's performance in obtaining its goals. This problem is further discussed on p. 317 *infra*.

As early as 1970, OFCC recognized the need for compliance review guidelines to assure uniformity among the agencies in the review of affirmative action plans and determinations of compliance. However, no final guidelines were issued until 1974; the four-year delay was due to a combination of factors, including industry pressure and OFCC's inability to develop procedures acceptable to all of the agencies.

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[947] As was noted in Part II supra, Revised Order No. 4 contains no guidelines on the identification of affected class members or on the proper remedies that should be afforded such persons. In March 1975, OFCC issued proposed guidelines for compliance agencies on minimum relief to be afforded affected class members.

[948] Prior to the issuance of standardized review procedures (Revised Order No. 14) in 1974, agencies were permitted to conduct compliance reviews according to their own procedures. Some of the agencies relied heavily on the offsite review or "desk audit." Others relied almost exclusively on reviewing the contractor's facility with no preliminary desk audit. Others used a combination of both by beginning with an offsite review and following with a visit to the contractor's facility. Some agencies developed standardized forms which requested specific information from the contractor prior to the compliance review. In addition, some agencies have developed their own guidelines on affected class remedies, testing, terminations, and other employment practices. One agency, DOD, without the knowledge of OFCC, developed a corporate contract compliance program in which the agency and corporate contractors developed an affirmative action plan to be used as a model by the individual corporate facilities. "Agency Contract Compliance Program Evaluation for Fiscal Year 1972," Memorandum to Heads of All Agencies from Philip J. Davis, Acting Director, OFCC, Feb. 5, 1973. Bierman interview (July 31, 1973), supra note 789. Moreover, some agencies developed informal arrangements with EEOC to facilitate coordination. Interview with John Henegan, Director, Office of Civil Rights, Maritime Administration, Department of Commerce, Aug. 3, 1973.

In 1970, OFCC drafted a Compliance Review form (called "Form B") which set forth systematic procedures for agencies to follow in conducting reviews.[949] OFCC also prepared a contractor reporting form, called Form A, to assure that the agencies had access to the information necessary to evaluate adequately affirmative action plan goals and objectives, as well as the contractor's performance in meeting those objectives.[950] While Forms A and B had some deficiencies,[951] they did offer one major advantage, which was excluded from review procedures subsequently developed. Contractors were given explicit instructions to compile most of the quantitative information which is necessary for a compliance review. Since compliance agencies were spending much of their time attempting to obtain the necessary information instead of evaluating it,[952] this procedure would have speeded up the review process and made it more efficient. These uniform data collection and review procedures were never implemented because OMB refused to approve the forms.[953] OMB did not permit the forms to be adopted because it received objections that Form A placed too much of a burden on contractors in terms of maintaining quantitative information on employment, turnover, and applicant flow.[954] Apparently, most compliance agencies and civil rights organizations considered Forms A and B to be adequate solutions to the problem of assuring uniform and effective evaluation of contractors.[955]

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[949] OFCC Form B: Compliance Review Report (Non-Construction), Draft, Aug. 18, 1970. Form B instructed the compliance agency to review the contractor's utilization analysis, applicant flow, rate of promotions for minorities and women, and selection criteria for hiring and promotion. The guidelines also directed agencies to analyze the contractor's seniority system to determine whether an affected class problem existed. In addition, the compliance reviewer was instructed to identify any outstanding complaints filed with OFCC or EEOC and to attempt to resolve these matters.

[950] OFCC Form A: Contractor's Self Analysis and Evaluation Form, Draft, July 31, 1971. This "Contractor's Self Analysis and Evaluation Form," was developed to require contractors to maintain, with their affirmative action plans, data on the employment status of minorities and women and data on turnover and applicant flow. This information was to be submitted to the compliance agency, upon request, for a thorough analysis prior to the onsite review of the contractor's facility.

[951] The review guidelines failed to give adequate instructions on testing and selection criteria and on the sufficiency of the goals and interim objectives for meeting the goals.

[952] Henegan interview, supra note 948.

Two years later, in March 1972, OFCC instructed the compliance agencies to implement a review procedure, called Order No. 14, which abandoned the concept of requiring contractors to submit a standardized reporting form but which substantially improved the compliance reporting form to be used by the agencies.[956] The compliance agencies objected to certain aspects of the order and formed an Interagency Committee on Order 14 to make recommendations to OFCC.[957] Few, if any, of the agencies implemented the review procedures, on the grounds that they were confusing and unworkable.[958] While the Interagency Committee was preparing its recommended changes in Order No. 14, nine major companies, under the auspices of the Labor Policy Association,[959] in June 1972, submitted serious objections to the review format.[960] Revised Order No. 14, issued to the compliance agencies by the Secretary of Labor in January 1973, incorporated many of the suggestions of the Labor Policy Association concerning the confidentiality of contractor employment data.[961]

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[953] Travers interview (Oct. 17, 1973), supra note 828. DOL contends that OMB did not disapprove Form A; rather the form was returned to DOL for further consideration. Dunlop letter, supra note 726.

[954] Robinson interview, supra note 827.

[955] Henegan interview, supra note 948. Interview with the late Ann Scott, Vice President, National Organization for Women, and Chairperson of the Equal Rights Committee of the Leadership Conference on Civil Rights, Oct. 5, 1973.

[956] Memorandum to Heads of All Agencies from George L. Holland, Director, OFCC, Mar. 15, 1972. Order No. 14 instructed the agencies to begin the review process by requesting the contractor's self analysis and affirmative action plan. If the analysis did not contain the requisite information (for example, job analyses, applicant flow, number of new hires and promotions, as well as minority and female representation), then the agency was instructed to issue a show cause notice. Order No. 14 included a coding sheet which was to be sent to OFCC on completion of the compliance review. The coding sheet included a table of the deficiencies found in the affirmative action plan and data on the contractor's current employment, projected employment, previous hiring and promotion of women and minorities, and its objectives for the following year.

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[957] Letter to John L. Wilks, Director, OFCC, from John M. Henegan, Director, Office of Civil Rights, Maritime Administration, (and Chairman, Interagency Committee on Order 14) Feb. 25, 1975. The principal objection of the agencies was that the issuance of a show cause notice for failure to supply the necessary information would be precipitate; they recommended, instead, that a second informational request be sent to the contractor if its self analysis and affirmative action plan did not contain the required data. The Interagency Committee also felt that the guidelines were not sufficiently instructive to the compliance reviewers on evaluating the adequacy of a contractor's performance and identifying necessary affected class relief. The Committee recommended that the Contract Compliance Officer's Manual, which had recently been issed by OFCC, be considerably expanded to include instructions on these basic problems. *Id.* The Contract Compliance Officer's Manual, issued in January 1972, had still not been revised as of July 1974. Wooten interview (July 18, 1974), *supra* note 774.

[958] Henegan interview, *supra* note 948.

[959] The Labor Policy Association is an organization made up of less than 100 companies which researches all aspects of labor-management relations. According to its general counsel, it is not a lobbying organization. Telephone interview with Kenneth McGinnis, General Counsel, Labor Policy Association, Jan. 9, 1974.

[960] Letter to Richard J. Grunewald, Assistant Secretary for Employment Standards, from Wesley R. Liebtag, Director, Personnel Programs, International Business Machines Corp., July 17, 1972. The companies expressed concern that some of the required information (for example, information on pay and job titles), once submitted to the compliance agency, might be disclosed to the public and thus "...expose employers to harassment and possible legal action." *Id.* Finally, the objected to the requirement that they provide the compliance agency with information concerning employee discrimination charges filed with the EEOC. *Id.* The companies recommended that only summary data, based on the last quarter, be required to be maintained. They suggested that applicant flow data be based on the last 6 months or the last 100 applicants, whichever would be less. The recommendations called for review of most employment information at the site of the contractor facility and asked that special provisions be made for information which the employer considered to be confidential. Id. According to Mr. Liebtag's letter, the recommendations were drawn up by IMB and eight other companies and were reviewed and endorsed by an additional 16 major companies.

Reactions from the compliance agencies were extremely critical of Revised Order No. 14. While the criticisms were not identical on every issue, the agencies all appeared to be concerned that the new confidentiality provisions would seriously inhibit the review process.[962] One agency

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961. 41 C.F.R. § 60-60 (1974); Memorandum to Heads of All Agencies from Secretary of Labor James D. Hodgson, Jan. 23, 1973. Revised Order No. 14 was not published for comment until May 21, 1973, 38 Fed. Reg. 13377. The order, as issued in 1973, instructed agencies to begin their compliance reviews by requesting a copy of the contractor's affirmative action plan, workforce statistics, and its utilization analysis; the utilization analysis was to be reviewed "in confidence." Id. The agency was to request only "summary data of nonsensitive nature" and contractors were permitted to exclude such information from submission to the agency if they were concerned with the confidentiality of such information. Id. Corrective Action Programs, designed to afford relief to affected class members, were to be reviewed on or offsite, but they were not to be disclosed by the agency.

962. Memorandum to Acting Director, OFCC, from Joseph M. Hogan, Director, Contractor Equal Opportunity Programs, NASA (undated), received OFCC, Feb. 28, 1973; Letter to Robert Hobson, Associate Director, OFCC from Marion Bowden, Assistant to the General Manager for EEO (Contract Compliance Officer), AEC, Feb. 26, 1973. Letters to Philip J. Davis, Acting Director, OFCC, from Stuart Broad, Director for Equal Opportunity, Civilian, Department of Defense, May 22, 1973; Edward Shelton, Director, Office for Equal Opportunity, Department of the Interior, Feb. 23, 1973; William Parker, Director, Contract Compliance Service, Veterans Administration, Feb. 22, 1973; John J. Brosnahan, Deputy Director of Civil Rights, General Services Administration, July 5, 1973. See also Transcript of OFCC Meeting with Agency Compliance Personnel on Order No. 14, U.S. Department of Labor, Mar. 13, 1973. Reactions from civil rights and other public interest organizations were also critical. See Letters to Philip J. Davis from Jessica J. Josephson, Women's Equity Action League, June 27, 1973; Ronald J. Plesser, Freedom of Information Project, Center for the Study of Responsive Law, July 5, 1973; J. Francis Pohlhaus, NAACP, William Taylor, Center for National Policy Review, June Chapman, National Organization for Women, June Willenz, American Veterans Committee, Girard P. Clark, American Federation of State, County, and Municipal Employees, Margaret Gates, Center for Women Policy Studies, July 5, 1973; Stephen E. Ronfeldt, Henry Hewitt, Russell Galloway, Legal Aid Society of Alameda County (undated); Congressman Donald M. Fraser, July 13, 1973, and Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, July 11, 1973.

compliance official wrote that the instructions concerning agency requests for data

> seem to put contractors in the position of telling the government how to conduct its business. . . Order 14, as presently written, goes a long way to inhibit, if not prohibit the gathering of necessary data to do our job.[963]

At a meeting of the compliance agencies convened by OFCC in March 1973, a number of the agencies indicated that they had already experienced increased difficulties obtaining information from contractors since Revised Order No. 14 was issued.[964] In the summer of 1973, following publication of Revised Order No. 14 for comment,[965] OFCC staff began working on another major revision in these procedures. In the meantime, no standard compliance review format was being followed by the agencies.[966]

By July 1974, OFCC had issued a substantially improved version of Revised Order No. 14.[967] The order instructs compliance agencies routinely to select contractors for compliance reviews.[968] Selection is to be made according to the factors outlined in the Revised McKersie System.[969] A compliance review is to begin with a request for copies of the contractor's affirmative action plan and supporting documentation, including the work force analysis.[970] The agency must analyze this information off the premises of the contractor.[971] This offsite desk audit must analyze the current composition of the contractor's work force to identify those jobs in which minorities or women are either underrepresented or overrepresented.[972] Once identified, these job titles are to be the principal focus of the review.[973] For each such "focus job title" with a substantial concentration of minorities or women, the reviewer is instructed to identify those "specific jobs wherein the minority or female incumbents could have been denied placement, promotions, or transfer due to discrimination."[974] Further analysis of the positions of these incumbent employees, who may constitute an affected

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[963] Shelton letter, supra note 962.

[964] Transcript of OFCC Meeting with Agency Compliance Personnel on Order No. 14, Mar. 13, 1973. At this meeting, an HEW compliance representative indicated that while OFCC recommends a time allotment of 40 hours for conducting a compliance review, his agency spends at leat 40 hours simply persuading the contractor to submit the necessary information to begin the compliance review. Id.

[965] 38 Fed. Reg. 13377 (1973). As noted above, Revised Order No. 14 was issued to the compliance agencies five months before it was published for comment.

[966] Henegan interview, supra note 948.

[967] The basis review procedure was issued in February, 41 C.F.R. § 60-60 (1974), effective May 15, 1974. 39 Fed. Reg. 13264 (April 12, 1974). However, the portion of the Order outlining the Standard Compliance Review Format was not published until July. 41 C.F.R. § 60-60.9, 39 Fed. Reg. 25655 (1974).

[968] 41 C.F.R. § 60-60.3(a)(1974).

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969. Id. Travers interview (July 24, 1974), supra note 685. The Revised McKersie System is described on p. 283-84 supra.

970. 41 C.F.R. § 60-60.3(a)(1974). This provision improves the review procedures issued in 1973, which failed to require contractors to submit for offsite review a listing of each job title.

971. 41 C.F.R. § 60-60.3(a)(1974). The compliance agency is permitted to conduct a review on the premises of the contractor at the outset if the review is being conducted prior to the award of a contract; so-called preaward reviews, discussed in Part IV supra, generally must be conducted in a relatively short period of time. Another exception to the desk audit requirement is provided for complaint investigations. 41 C.F.R. § 60.3(a)(1)(1974).

972. 41 C.F.R. § 60-60.9, Part A II, 39 Fed. Reg. 25656 (1974) Since discrimination may occur in placing minorities or women only in particular jobs, the result may be underrepresentation in some jobs and concentration in others. Thus, the Desk Audit Analysis must consider both.

973. Id.

974. 41 C.F.R. § 60-60.9, Part A VI, 39 Fed. Reg. 25657 (1974).

class, is to be conducted during the review on the premises of the contractor. Prior to the onsite review, the agency is to inform the contractor that it must provide detailed listings of these employees for onsite investigation by the agency's representatives.[975]

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[975] Id. The 1973 version of Revised Order No. 14 contained no instructions concerning the identification of affected class members; the addition of some instructions in this regard is one of the important improvements in the most recent version.

For each "focus job title," in which underutilization exists, the desk audit reviewer is to determine whether the contractor's affirmative action plan goals are sufficient and whether its past performance in meeting these goals has been adequate.[976] While goals must be set for the purpose of ultimately eliminating underutilization, the contractor should further establish annual rates of hiring and promoting women and minorities. These intermediate objectives must be the maximum rates that can be achieved by good faith recruitment and training programs and "must not be lower than the percentage rate set in the ultimate goal."[977]

This section of Revised Order No. 14 greatly clarifies the method by which agencies are to evaluate a contractor's goals and timetables and its performance in meeting its goals. Previously, contractors were permitted to set annual goals in absolute numbers based on the projected number of vacancies and new positions occurring over the plan year. Thus, a contractor could set a goal of hiring 10 black females based on an expected number of 50 vacancies. At the end of the plan year, the contractor would have been deemed in compliance if it had hired 10 black females, even if the actual number of vacancies had been 100; in this case the contractor's hiring rate would have been 10 percent instead of the 20 percent necessary for ultimately eliminating underutilization.[978]

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[976] 976. 41 C.F.R. § 60-60.9, Part A, II, B(3), 39 Fed. Reg. 25656 (1974). As will be shown below, the procedure does not provide for the collection of information essential for making the latter determination.

[977] 977. 41 C.F.R. § 60-60.9, Part B, XII(c), 39 Fed. Reg. 25660 (1974).

[978] 978. In this hypothetical, it is assumed that the employer had an ultimate goal of obtaining a work force which would be slightly less than 20 percent black female. If that goal is ever to be reach, the hiring rate, in percentage terms, must be at least 20 percent.

Since employers frequently underestimated their projected vacancies, this was a recurring problem in the compliance program.[979] While OFCC is to be commended for providing this guidance to compliance agencies, it is regrettable that similar language was not added to Revised Order No. 4, which sets forth the requirements of contractors in setting goals.

In addition to the analysis of the contractor's workforce, the Desk Audit must include a review of sample data on applicant flow and hiring rates[980] to determine whether there is a lower rate of job offers to and hiring of minorities or women with regard to the focus job titles. If a lower rate is found to have occurred, then the reviewing officer must ask the contractor to provide, during the onsite review, an analysis showing the reasons for rejecting all of the applicants in the sample.[981] The Desk Audit should also include a similar review of promotion, transfer, and termination practices.[982]

Analysis of recruitment, hiring, selections, and placement patterns is to be based on 100 applicants or 10 percent of all applicants, whichever number is greater.[983] This provision requiring analysis of sample data only prevents the

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979. Interview with George Travers, Associate Director, OFCC, Jan. 1, 1974.

980. 41 C.F.R. § 60-60.9, Part A III B, 39 Fed. Reg. 25656 (1974).

981. 41 C.F.R. § 60-60.9, Part A III E, 39 Fed. Reg. 25657 (1974).

982. 41 C.F.R. § 60-60.9, Part A III IV and V, 39 Fed. Reg. 25657 (1974).

983. 41 C.F.R. § 60-60.9, Part A III IV and V, 39 Fed. Reg. 25656-25657 (1974).

compliance agency from making the essential determination of whether a contractor is making good faith efforts to meet its affirmative action commitments. The order instructs the agency to determine whether the contractor has met its past objectives and whether it is proceeding at a rate sufficient to meet its current objectives.[984] These objectives must be stated in terms of annual percentage rates of hiring or promoting minorities and women. Thus, in order to determine that these objectives have been met, it is necessary to know the percentage of the total job opportunities, or vacancies and new positions, in focus job titles which were filled with minorities and women. However, the order nowhere instructs agencies to collect this information and, in fact, discourages them from doing so.[985]

If a contractor believes that the data requested for offsite analysis are not relevant to its compliance status, it may request a ruling from the agency's Contract Compliance Officer; this ruling, which must be made within 10 days, may be appealed to the Director of OFCC. However, the information in question must be provided to the compliance review officer offsite pending a final ruling by the OFCC Director, which also must be made within 10 days.[986]

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[984] 984. 41 C.F.R. § 60-60.9, Part A I B B, II B(3), 39 Fed. Reg. 25656 (1974).

[985] 985. 41 C.F.R. § 60.9, Part A III, IV, and V, 39 Fed. Reg. 25656-25657 (1974). These provisions instruct the compliance agency to analyze sample data only. The Department of Labor maintains that use of sample data is sufficient for identifying problems and that once such an identification has been made, additional data can be collected. Dunlop letter, supra note 726.

The desk audit, under most circumstances, must be followed by an onsite review. However, if the desk audit review reveals that the contractor has not demonstrated a reasonable effort to comply with Revised [illegible]er No. 4, the agency may immediately issue a show cause notice without conducting an onsite review.[987] The agency may also forego the onsite review if it determines that the contractor's affirmative action program conforms with Revised Order No. 4 and if an on-site review has been conducted of the contractor within the preceding two years.[988]

986.. 41 C.F.R. § 60-60.4(c) (1974). OFCC regulations, 41 C.F.R. § 60-40, specify that most contract compliance information in agencies' files must be disclosed under the Freedom [illegible] Information Act, 5 U.S.C. § 552 (1970). See also Legal Aid Society of Alameda County v. Shultz, supra note 830. Revised Order No. 14 states that contractors should identify that information submitted for off-site review which they believe is exempt from these disclosure requirements. 41 C.F.R. § 60-60.4 (d) (1974). The agency Contract Compliance Officer must make a determination on the contractor's claim within 10 days, following which the contractor may, within 10 days, appeal to the Director of OFCC. The Director must, in turn, make a final determination within 10 days. Id. According to OFCC, as of July 1974, there had been fewer than five such appeals since the Order became effective in February. Hobson interview (July 24, 1974), supra note 715. This section constitutes a significant improvement over the disclosure provisions contained in the previous version of Revised Order No. 14 because it places responsibility in the agency, rather than the contractor, for determining what information is relevant to compliance. See note 961 supra. Further, the new section, in contrast to the earlier one, conforms with the mandate of the Freedom of Information Act. The previous disclosure provisions--by prohibiting agencies from acquiring custody of allegedly confidential information essential for evaluating contractors' employment programs--blocked public access to such information, thus effectively preventing any public knowledge about, and evaluation of, the government's compliance program. The importance of permitting public access to contract compliance information was demonstrated in Legal Aid Society v. Brennan, supra note 830, which is discussed on pp. 333-34 infra.

987. 41 C.F.R. § 60-60.3(b) (1974).

988. Id.

Prior to the initation of the onsite review, the compliance review officer is to send a letter to the contractor listing the information which must be available onsite. If sample data on applicant flow, promotions, transfers, and terminations were not submitted previously, the contractor must provide these data for onsite analysis.[989] If necessary, this information may be taken for offsite analysis following the onsite review.[990]

During the onsite review, the compliance officer should survey the community concerning the contractor and laborforce conditions,[991] determine the nature and extent of the employer's government contracts, inspect the facilities to ascertain if EEO posters are displayed, and interview management employees to determine the extent to which they are aware of and play a role in EEO policies.[992]

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[989] 41 C.F.R. § 60-60.9, Part A, II B (3)(c), 39 Fed. Reg. 25656 (1974); 41 C.F.R. § 60-60.3(b) (1974). These data are not required to be submitted with the affirmative action plan for offsite analysis but must be made available for inspection onsite. The regulation specifically states that the applicant flow, promotion, transfer, and termination items "...are not intended to be used to impose additional standard reporting requirements on contractors." 41 C.F.R. § 60-60.9, Part A II B (3)(c) 39 Fed. Reg. 25656 (1974). This provision was included after industry groups raised objections to the Business Advisory Council on Federal Reports of OMB. Travers interview (July 23, 1974), supra note 685.

[990] 41 C.F.R. § 60-60.3(c) (1974).

[991] 41 C.F.R. § 60-60.9 Part B II, 39 Fed. Reg. 25657 (1974). For example, the reviewing officers must prepare a report on the make-up of the relevant labor force area, other employers with which the contractor competes for labor, and the image of the contractor as an employer in the minority and women's communities. Id.

[992] 41 C.F.R. § 60-60.9 B III, IV, 39 Fed. Reg. 25657, 25658 (1974).

In addition, the compliance officer must review the contractor's job application process,[993] including completing the analysis of applicant flow data. At this stage, the review should consider whether any selection standards used by the contractor in hiring or promoting employees have an adverse effect on minority or female applicants;[994] if such is the case, then the reviewing official must determine whether the contractor has prepared an adequate study validating the selection standard according to OFCC Guidelines.[995] If the standard has not been validated, the contractor must take steps to validate it and may be required to eliminate or alter its use.[996] If a validation study has been prepared, the officer must review the evidence to determine whether it complies with the requirements of OFCC's Guidelines.[997]

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[993] 41 C.F.R. § 60-60.9, Part B V 39 Fed. Reg. 25658 (1974). Questions which the compliance review officer must consider include the following:

> Are different interviewers assigned to interview applicants because of their job interest, race, or sex? Is job counseling offered? If not hired, is the applicant given a specific reason? Is it generally the real reason and is it so noted on the application form? If not hired, what happens to the application form? What are the possibilities of the application being retrieved at a later date? Based on the EEO specialist's analysis of records as well as the contractor's statements, has this happened very often? If the employment office does not make final decisions for hire, who does and on what basis? If additional interviews are conducted, is there feedback to the employment office and the EEO Coordinator? Does anyone monitor for disparate rejection ratios of minorities and women? Can and does anyone challenge decisions made by the selecting officials? Are those who make selections conscious of the contractor's goals and timetables? Describe what role if any the Coordinator has in the selection process. Id.

[994] 41 C.F.R. §60-60.9, Part B V B, 39 Fed. Reg. 25658 (1974). Adverse effect is defined in note 739 supra.

[995] Id. OFCC's Guidelines on Employee Testing and other Selection Procedures, 41 C.F.R. §60-3 (1974), are discussed in Part II supra.

Should the onsite review of the applicant flow data reveal that minorities and women are not applying for jobs with the contractor in proportion to their representation in the workforce, then the officer must investigate the contractor's recruitment methods and sources.[998] Further, the officer must prepare a final analysis of promotion, transfer, and termination patterns to determine if there is a disparity in the rates of promotion, transfer, and termination of women and minorities compared with such rates for nonminorities and males.[999] The Compliance Officer must also review the wages and salaries of a sampling of employees in selected job titles to determine whether minorities or women hold positions paying lower rates than other positions with similar duties.[1000]

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996. 41 C.F.R. § 60-60.9, Part B V B (2) (b), 39 Fed. Reg. 25658 (1974). For example, the contractor may have to alter test cutoff scores to permit the hiring of applicants who would otherwise be rejected. Id.

997. Id. In cases where the compliance officer is unable to make a determination of compliance with the Guidelines, the evidence should be submitted for review by testing specialists on the staff of the compliance agency or OFCC. Interview with Stephen Bemis, Staff Industrial Psychologist, OFCC, July 31, 1974.

998. 41 C.F.R. § 60-60.9, Part B V, VIII, 39 Fed. Reg. 25659 (1974).

1000. 41 C.F.R. § 60-60.9, Part B IX, 39 Fed. Reg. 25659 (1974). The onsite review must also include an analysis of the training, educational and tuition assistance programs which the contractor provides for its employees. Included in this analysis must be an indication of the participation rate in such programs of all employees, crosstabulated by race, ethnicity, and sex. 41 C.F.R. § 60-60.9, Part B, 39 Fed. Reg. 25660 (1974).

Moreover, during the onsite review, the compliance officer must prepare an analysis of focus job titles[1001] in which there are substantial concentrations of minorities or women.[1002] These employees may constitute an affected class.[1003] If a review of data on persons recently hired shows that placement into jobs or departments "has been oriented according to race or sex...then all present minority and female incumbents of the units identified should be considered members of an affected class."[1004] A specific definition of the affected class must be formulated and an analysis prepared of the employment practices causing the perpetuation of the past discrimination.[1005] In addition, remedies for the affected class must be devloped. Revised Order No. 14, however, gives no instructions or guidelines on appropriate affected class remedies other than an instruction to the compliance officer to refer "to OFCC

[1001] See p. 313 supra.

[1002] 41 C.F.R. § 60-60.9 Part B X, 39 Fed. Reg. 25659 (1974).

[1003] The concept of affected class is explained in note 717 supra.

[1004] 41 C.F.R. § 60-60.9 Part B X C ,39 Fed. Reg. 25659 (1974).

[1005] 41 C.F.R. § 60-60-6.9 Part B X E, 39 Fed. Reg. 25659 (1974). The analysis should focus on employment practices which operate to bar or discourage affected class members from moving into better jobs. An example of such practices is a seniority system which requires an employee transferring out of a department or line of progression to lose seniority and job retention rights. Another such practice would be the application of a selection standard, for example a high school diploma requirement,which disproportionately rejects minorities and cannot be demonstrated to be job-related.

Guidance memos on affected class in developing each step of the remedy."[1006] As of March 1975, however, no such memoranda had been issued, and there was no OFCC policy on affected class relief.[1007]

The Revised Order No. 14 review procedures place too much responsibility on the compliance agency for compiling information during the desk audit and onsite review. They should, instead, authorize the agency to require more data compilation by the contractor. This could substantially decrease the amount of time and resources agencies must spend in conducting compliance reviews and is clearly within the authority of the Executive order.[1008] Compliance agencies are currently so understaffed that, even with no procedural requirements, they have been unable to review more than four to eight percent of all contractors per year.[1009] Instead of requiring the agencies to devote significant staff time to compiling information, OFCC should enforce Revised Order No. 4 which places this responsibility on the contractors.[1010]

[1006] 41 C.F.R. § 60-60.9 B X G, 39 Fed. Reg. 25660 (1974). This section also instructs the reviewing officer to consider the following questions:

> Referring to the lines of progression or promotional sequences, which jobs must dead-ended minorities and women move into in order to progress? Would the affected class employee require additional training to progress? Are the jobs in the promotional sequences functionally related? What changes in the bargaining agreements would be necessary in order to stimulate transfer of affected class members or perhaps make transfer unnecessary? Has the contractor already initiated some action in this regard? When? Could long-time affected class members possibly move up more than one job title immediately or with little extra training in order to obtain their rightful place in relationship to their company seniority. Id.

[1007] Proposed guidelines on affected class relief were published in late March 1975. See discussion on p. 244 supra.

[1008] Exec. Order No. 11246, Sec. 203, 3 C.F.R. 1964-1965 Comp., p. 341; see note 697 supra.

[1009] See Part IV supra.

At the completion of the onsite review, the compliance officer is to hold an "exit conference" with the contractor's officials, during which apparent violations with the Executive orders are to be outlined.[1011] The purpose of the conference is to solicit from the contractor commitments to take specific corrective action which "should be contained in a written conciliation agreement."[1012] The term "conciliation agreement" is not defined in any OFCC regulation. According to Revised Order No. 4, a conciliation agreement should include corrective action commitments providing relief to affected class members.[1013] These agreements would be disclosed to the public on request.[1014] OFCC has developed no guidelines or instructions concerning the way in which such agreements are to be drafted by compliance agencies,

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1010. For example, Order No. 14 instructs the agencies to determine whether any of the contractor's employee selection standards have an adverse effect on a protected group. 41 C.F.R. 60-60. This determination is made by a series of mathematical calculations, which, when required to be conducted for a large number of tests and other selection devices, can be quite time-consuming. Since the affirmative action requirements of Revised Order No. 4 direct the contractor to identify selection standards having an adverse effect, contractors could reasonably be required to provide to the reviewing agency a report identifying each selection standard used and its rejection rate for each group of applicants; such a report should further indicate whether these rates show an adverse effect and, if so, to what extent the contractor has progressed in validating the standard. Similarly, contractors should be required to compile aggregate turnover data, crosstabulated by race, ethnicity, and sex. Verification of such data could be obtained by random checks and by distributing the reports to the contractor's employees. These methods were used in verifying data submitted by the American Telephone and Telegraph Co. (AT&T). Interview with David Copus, Deputy Chief, National Programs Division, EEOC, Jan. 3, 1975. For a discussion of the AT&T case, see pp. 336-38, infra.

1011. 41 C.F.R. § 60-60.6(a) (1974).

1012. Id.

1013. 41 C.F.R. § 60-2.1 (1974).

1014. Hobson interview, (July 24, 1974), supra note 715.

by which these agreements are to be monitored. Instead, monitoring of compliance with conciliation agreements will be on the same random basis by which contractors are selected for compliance reviews.[1015]

Upon completion of the exit conference, the compliance agency must prepare a written report according to the format required in Revised Order No. 14.[1016] This report need not be forwarded to OFCC but is subject to review by that Office.[1017] However, the agency is required to forward a coding sheet to OFCC before the contractor's affirmative action plan may be accepted.[1018]

The coding sheet, which provides basic information drawn from the compliance review, was included as a part of Revised Order No. 14 issued in January 1973[1019] and has not undergone any subsequent revisions.[1020] The sheet shows the contractor facility reviewed, the type of review,[1021] the hours expended in conducting the review, and a table of deficiencies found. It also calls for a narrative statement concerning affected class problems and EEOC charges still pending.[1022] The coding sheet includes tables, one of which, Table Q, is designed to show the contractor's workforce, crosstabulated by race, ethnicity, and sex. for at least one year prior to the compliance review and at the beginning of the current affirmative action program year; the total number of persons hired during the year preceding the current affirmative action program, crosstabulated by race, ethnicity, and sex; and the number of females and minorities the contractor will attempt to hire during the current plan year.

[1015] Id.

[1016] 41 C.F.R. § 60-60.9, 39 Fed. Reg. 25655 (1974).

[1017] Id.

[1018] 41 C.F.R. § 60-60.7 (c) (1974).

[1019] Hodgson Jan. 23, 1973, Memorandum, supra note 961. The coding sheet was not included in the public notice concerning Revised Order No. 14, 38 Fed. Reg. 1337 (1973).

[1020] Travers interview (July 23, 1974), supra note 685.

[1021] For example, whether it is a preaward, postaward, or followup review or whether it is a review conducted to investigate a complaint.

Table Q does not collect data on past or projected promotions of minorities and women.[1023] The failure to include past or projected promotions prevents any OFCC analysis of the adequacy of the contractor's current promotion objectives, as well as its performance in meeting these targets. The coding sheet further fails to reflect the contractor's previous affirmative action plan goals. This omission precludes any analysis, from the coding sheet, of the contractor's past performance in meeting any of its goals or annual objectives. OFCC staff submits that this problem is overcome by comparing coding sheets from previous years or by referring to EEO-1 data.[1024] However, it is highly unlikely that coding sheets will be prepared each year on every contractor since, on the average, contractors appear to be reviewed only once every 15 years.[1025] EEO-1 data are wholly inadequate for the

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1022. Revised Order No. 14 does not instruct agencies to seek from EEOC information concerning the Title VII charges pending against the reviewed contractor. Thus, it is difficult to understand how agencies are expected to provide this information.

1023. Hodgson Jan. 23, 1973 memorandum, supra note 961.

1024. Travers interview (July 24, 1974), supra note 685. The standard EEO-1 form is described on p.250 supra. OFCC does not intend to revise Table Q to collect additional information. If any changes are made, they will be in the nature of reducing the amount and kinds of data collected. Id.

1025. See p. 294, supra.

purpose of measuring a contractor's performance in meeting its goals because they do not show the number of job opportunities.[1026] Finally, the coding sheet fails to make the important distinction between ultimate goals to eliminate underutilization and annual hiring and promotion objectives.[1027]

Compliance agency representatives interviewed by this Commission in July 1974 generally agreed that the new procedures were good but that additional guidelines were needed to clarify certain aspects of the compliance process, such as calculating the availability of women and minorities.[1028] There was also criticism of the procedures for failing to include any instructions concerning cooperation with EEOC in cases in which

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1026. EEO-1 data do not show the number of positions created by turnover and growth nor the number of minorities and women filling these positions.

1027. The coding sheet uses the term "goal" to refer both to an annual hiring objective and to an ultimate level of satisfactory utilization. As OFCC, itself, appears to have acknowledged, the distinction is essential in determining the contractor's progress in eliminating underutilization. Technical Guidance Memo No. 1 on Revised Order No. 4, supra note 713.

1028. Interviews with Jack Bluestein, Assistant Director, Contract Compliance Division, Office of Equal Opportunity, Department of the Interior, Aug. 1, 1974; John Henegan, Director, Office of Civil Rights, Maritime Administration, Department of Commerce, Aug. 1, 1974; Robert Coates, Chief, Public Programs Division, Office of Civil Rights, Department of Transportation, Aug. 1, 1974.

a contractor is also a Title VII respondent.[1029] Moreover, some anticipated difficulty in assuring that their field offices followed the procedures, since they did not have direct authority over these staffs.

C. OFCC Monitoring of the Nonconstruction Program

The extent to which the compliance agencies actually follow the standardized procedures will depend on OFCC's role in supervising and monitoring the entire program. OFCC regulations provide for some supervision by OFCC over the contract compliance programs of the agencies. For example, compliance agencies may not issue notices of proposed debarment or cancellation or termination of contracts without OFCC approval.[1030] A finding that a prospective

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1029. In September 1974, OFCC signed a Memorandum of Understanding with EEOC, which provides for exchange of information concerning Title VII respondents and Federal Contractors in noncompliance. Memorandum of Understanding, supra note 819. Compliance agencies are required to comply with OFCC directives to provide EEOC information on specific contractors. Memorandum from Peter J. Brennan, Secretary of Labor; Bernard E. DeLury, Assistant Secretary for Employment Standards; and Philip S. Davis, Director, OFCC, to Heads of All Agencies (Sept. 16, 1974).

1030. 41 C.F.R. § 60-1.27 (1974).

contractor is non-responsible, and thus not eligible for the award of Federal contracts, may be overruled by OFCC.[1031] Further, OFCC may, at any time, inquire into the status of any matter pending before a compliance agency and, if necessary, assume jurisdiction over a contractor. After OFCC has conducted its own investigations or ordered appropriate sanctions, it may return jurisdiction to the compliance agency with instructions as to the course of action the agency is to follow.[1032]

Finally, OFCC may revoke the entire assignment of responsibility from an agency at any time. If an agency repeatedly fails to conform to Executive order regulations, OFCC's ultimate recourse is to revoke the agency's complisnce responsibilities. OFCC has not exercised this authority. The only instances of such revocation occurred in the context of a plan developed in 1974 to consolidate the compliance programs of smaller agencies into those of agencies with larger compliance programs. According to OFCC, this consolidation will be made with no regard for the past performance of the agencies.[1033] Thus, NASA, which had a relatively small compliance responsibility, lost its jurisdiction over supply and service contractors despite the fact that it had consistently ranked first among the compliance agencies in relation to the proportion of contractors reviewed; and compliance programs flagrantly violating the law, such as HEW's program for institutions of higher education, have been maintained.[1034] HEW, for example, has routinely violated the compliance review procedures required by OFCC, and it has issued guidelines to its contractors which seriously conflict with Executive order regulations; nevertheless, as of February 1975, OFCC had taken no action in response to HEW's violations.

[1031] 41 C.F.R. § 60-2.2(b) (1974).

[1032] 41 C.F.R. § 60-1.25 (1974).

[1033] Davis interview (July 23, 1974), supra note 728. In the fall of 1974, the OFCC Director admitted to a congressional subcommittee that if agencies's responsibilities were revoked on the basis of performace criteria, there would be no compliance agencies left. Testimony of Philip J. Davis, Director, OFCC, Before the Subcommittee on Fiscal Policy of the Joint Economic Committee, Sept. 12 1974.

OFCC reported to Congress in 1971 that it was equipped to monitor the compliance agencies effectively.[1035] However, OFCC's performance during fiscal years 1973 and 1974 indicates that it has not carried out its monitoring function to any meaningful degree. During fiscal year 1973, agencies approved more than 17,000 affirmative action plans, most of them pertaining to nonconstruction contractors.[1036] During approximately the same period of time, OFCC reviewed only nine approved plans to determine whether they conformed with the requirements of Revised Order No. 4.[1037] OFCC concluded that not one of the nine approved plans conformed with Revised Order No. 4 and that the compliance agencies had ignored these deficiencies in their compliance review reports.

[1034] For a discussion of the contract compliance program within the Higher Education Division of HEW's Office for Civil Rights, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974: To Ensure Equal Educational Opportunity Ch.3 (January 1975). For a discussion of compliance agencies' relative performance records, see pp. 291-94 supra. In addition to NASA, one other small compliance agency, AID, had lost its jurisdiction as of August 1, 1974. See note 794 supra.

[1035] Legislative History, supra note 847.

OFCC also found that out of the nine contractor facilities whose affirmative action plans had been approved, two had failed to develop any self-evaluation whatsoever; five others had not developed goals and timetables despite significant underutilization of minorities and women; five of the contractors had a number of unresolved complaints with OFCC and EEOC;

[1036] See Part IV supra.

[1037] From May 1972 to August 1973, OFCC reviewed seven plans approved by the Department of Defense, one by the General Services Administration, and one by the Department of the Interior. Memoranda to Francis Ridley, Chief, Compliance Operations, OFCC, from Curtis Simms (Compliance Operations Staff), May 8, 1972, June 15, 1972, July 10, 1972, July 26, 1972, Aug. 1, 1972, and Mar. 27, 1973; from William Grimley (Compliance Operations Staff), Aug. 6, 1973; Memorandum to Leonard Bierman, Associate Director, OFCC, from Francis Ridley, May 11, 1972; Memorandum to Robert Hobson, Associate Director, OFCC, from William Grimley, Dec. 13, 1972. In late 1972, OFCC attempted to evaluate the quality of the affirmative action plans which agencies were accepting following the issuance of show cause notices. To carry out this study, OFCC requested the submission of 15 specific affirmative action plans which had triggered the withdrawal of a show cause notice. Five plans were requested from the Department of Defense, four from the Department of the Interior, and two each from the General Services Administration, Veterans Administration, and Atomic Energy Commission. Memorandum from Francis Ridley, Chief Compliance Operations, to Robert Hobson, Associate Director, Non-Construction Operations, Dec. 13, 1972. Eight months later, only one of these 15 affirmative action plans had actually been audited by OFCC although all had been submitted by the agencies. Interview with Francis Ridley, Chief Compliance Operations, OFCC, Aug. 8, 1973. The nine affirmative action plans and compliance review reports which were audited in 1973, and which are discussed above, included one from the group of plans requested in 1972; the other eight plans and compliance review reports were audited following appeals to OFCC from complainants who felt that the compliance agency had not satisfactorily investigated their complaints. Id.

and discriminatory seniority, transfer, and promotion systems had been found at almost all of the facilities, but none had been revised.

In each of the nine cases, OFCC staff recommended to the OFCC Director or to one of his immediate subordinates that additional steps be taken, either in the form of further talks with the contractor, the issuance of a show cause notice by the agency, or the assumption of jurisdiction by OFCC.[1038] In only two of these cases did OFCC actually take any action or make any recommendations to the compliance agency. In one instance, OFCC recommended to the compliance agency that a show cause notice be issued; according to OFCC staff, the agency did not follow this recommendation.[1039] In the other instance, OFCC revoked approval of the affirmative action plan in April 1973, and conducted a joint compliance review of the contractor facility with the compliance

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1038. Ridely interview (Aug. 8, 1973), supra note 1037.

1039. Id. This contractor, a facility of the General Electric, Co., Inc. had been the subject of numerous complaints; in 1971, following a Congressional inquiry, the compliance agency (the Department of the Defense) conducted an investigation but found that the complaints were invalid; and the facility's 1972 affirmative action plan was approved. In 1973, OFCC reviewed the complaint investigations and the 1973 affirmative action plan. OFCC found that the facility's work force was only 2.5 percent minority although the available labor force was 25 percent minority. The facility's 1973 affirmative action plan had no goals and timetables, despite this underutilization. Moreover, OFCC staff determined that the complaint investigations had been deficient. Simms Memorandum, supra note 1037.

agency. It did not assume jurisdiction over the contractor, however, and eventually withdrew from the case in August 1973 because it did not have adequate staff. No further action was taken, and the deficiencies identified by OFCC were apparently not resolved.[1040]

OFCC does not know how many approved affirmative action plans were audited during fiscal year 1974, but it estimates the number to be approximately 100, or less than one percent of the total number of plans approved. No audit reports were made, nor were any reports made of the four joint compliance reviews conducted.[1041] Moreover, OFCC was not able to provide this Commission with the names of the contractors covered by the four joint reviews.[1042]

OFCC's inability to monitor agencies' approval of affirmative action plans led, in one instance, to the initiation of a private lawsuit. In June 1974, a Federal District court ruled, in a case brought by the Legal Aid Society of Alameda County, California, that the affirmative action plans of contractors in Alameda County, which had been approved by the Department of Agriculture (USDA), were in flagrant violation of OFCC regulations.[1043] The court ordered the Department to rescind its approval of the plans and restrained the compliance agency from approving additional affirmative action plans not containing adequate utilization analysis, goals, and timetables. The court's order provided relief which included a means of monitoring the Department of Agriculture's operations by the plaintiffs and the court. The court required the compliance agency to submit to the court and the Legal Aid Society copies of any additional affirmative action plans which it approves for contractors in Alameda County within 15 days of approval. The plaintiff's request that the court extend its order to all contractors under the defendant had still not been ruled on as of September 1974.[1044]

[1040] Ridley interview (Aug. 8, 1973), supra note 1037. This case involved the Tampa facility of Continental Can, a contractor assigned to the Department of Defense.

[1041] Hobson interview (July 24, 1974), supra note 713.

[1042] Id. Wooten interview (July 18, 1974), supra note 774; Davis interview (July 23, 1974), supra note 728. The Government Accounting Office found that OFCC had reviewed only 15 plans during fiscal years 1973 and 1974. GAO Report, supra note 830. OFCC disputed this figure but was unable to produce any supporting documentation. Davis testimony, supra note 1033. During fiscal year 1974, GAO reviewed 120 affirmative action plans approved by GSA and DOD in four regions. The GAO found that 70 percent of the 60 plans approved by GSA and 20 percent of the plans approved by DOD failed to comply with Revised Order No. 4. The most frequently occuring deficiency in the plans was an inadequate work force analysis. 1975 GAO Report, supra note 726, at 21-2.

[1043] Legal Aid Society of Alameda County v. Brennan, supra note 830.

In mid fiscal year 1974, OFCC established four Agency Compliance Divisions specifically to monitor and assist the compliance agencies.[1045] One of the most important functions of these new divisions is to perform desk audits of approved affirmative action plans. Three types of criteria will be used in selecting contractor affirmative action plans for audit.[1046] Some contractors will be selected on the basis of size, potential impact on other employers, and geographical location. A second category of contractors will be selected because of particular unresolved issues in the affirmative action plan, such as a testing problem. These will be selected from a review of the coding sheets'

1044. Id.

1045. See Part III, Section C, supra.

1046. Travers interview (July 24, 1974), supra note 685.

Table of Deficiencies.[1047] The third group will be selected from a review of Table Q data and will be those with inadequate goals or whose progress in eliminating underutilization appears to be inadequate.[1048] Although the OFCC program plan calls for desk audits of approximately 560 affirmative action plans during fiscal year 1975,[1049] as of the end of July 1974, this audit program had not been implemented because the coding sheet data were not yet available.[1050] In addition, agencies were failing to submit coding sheets for more than half of the reviews conducted, and 80 percent of those submitted were improperly coded.[1051]

Since 1969,[1052] OFCC has revoked a compliance agency's approval of a contractor's affirmative action plan and assumed jurisdiction over a contractor in only two instances.[1053] In 1971, OFCC revoked approval by the Department of Transportation of the Delta Airlines affirmative action plan; and in 1972, it withdrew jurisdiction over American Telephone and Telegraph Company (AT&T) from the General Services Administration. OFCC took both actions only after it had been notified that other agencies, EEOC in the case of AT&T, and the Department of Justice in the case of Delta Airlines, had a serious interest in the matter which was jeopardized by the compliance agency's action in approving the contractor's affirmative action plan. In both instances, no acceptable commitments were obtained from the contractor until a joint agency effort was initiated.

[1047] See p. 325 supra.

[1048] Table Q is described on p.326 supra. As noted above, Table Q data do not permit analysis of the extent to which a contractor has met its previous affirmative action plan objectives.

[1049] Dunlop letter, supra note 726.

[1050] Travers interview (July 24, 1974), supra note 685.

[1051] Id.

[1052] In 1968, OFCC assumed jurisdiction over International Paper Co., which had been the responsibility of GSA. Telephone interview with Francis Ridley, Chief, Compliance Operations, OFCC, Dec. 7, 1973.

[1053] Davis interview (July 23, 1974), supra note 828.

GSA accepted the affirmative acion plan of AT&T in September 1972. At the same time, EEOC was challenging the company's employment practices in hearings before the Federal Communications Commission (FCC).[1054] Prior to September, GSA, OFCC, and EEOC had held meetings on the Government approach to the AT&T plan.[1055] EEOC had submitted a memorandum to GSA raising 22 objections to the AT&T proposal.[1056] EEOC was concerned that the Government's position on AT&T be coordinated, since it felt that GSA approval of an affirmative action plan that did not remedy the major deficiencies it had identified would jeopardize its litigation before the FCC.[1057] The AT&T affirmative action plan eventually approved by GSA did not remedy many of the major deficiencies identified by EEOC.[1058] According to GSA, it had requested policy guidance from OFCC on several occasions but had not received any clear instructions.[1059] Shortly after the plan was approved by GSA, OFCC revoked approval and technically assumed jurisdiction over AT&T. Officials from EEOC, the Department of Justice, and the Office of the Solicitor and the Wage and Hour Division of the Department of Labor then met with representatives from AT&T and developed a new affirmative action plan and a major settlement involving $15 million in back pay and $38 million in wage adjustments during the first year.[1060] No high

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[1054] See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. 1, To Regulate in the Public Interest 57-62 (November 1974).

[1055] Telephone interviews with Edward Mitchell, Director, Contract Compliance Staff, GSA, Oct. 24, 1973, Leonard Bierman, Associate Director, OFCC, (Oct. 25, 1973; David Copus, Deputy Chief, National Programs Division, EEOC, Oct. 5, 1973.

[1056] Copus interview, supra note 1055. EEOC's objection to the AT&T plan included the company's failure to provide back pay relief to discriminatees; the absence of a revised transfer and promotion system; the lack of modifications of the company's testing procedures despite challenges by EEOC to the tests' validity; and a failure to include goals for placing women in key craft jobs from which they had been excluded previously. Id.

[1057] Id. There is disagreement among the agencies on the question of whether the discussions led to any understanding concerning coordinating GSA and EEOC policies toward AT&T. According to OFCC, there was an oral agreement among the agencies to coordinate policy in order not to approve an affirmative action plan contrary to that which EEOC felt was necessary. Bierman interview, supra note 789. GSA maintains that it never agreed to withholding approval of the AT&T plan until EEOC's objections were satisfied. Mitchell interview, supra note 1055. EEOC, on the other hand, says that there was such an understanding Copus interview, supra note 1055. It is agreed, however, that OFCC provided no written guidelines to GSA on the procedures it was to follow. Bierman interview, supra note 789.

1058. Copus interview, supra note 1055.

1059. Mitchell interview, supra note 1055.

1060. The agreement is discussed more fully in Chapter 5 infra.

level officials from OFCC participated in the negotiations.[1061] Further, as a result of lack of coordination among the agencies, no compliance reviews were conducted of any AT&T facilities from September 1972 to June 1974.[1062]

1061. The only OFCC representative who participated in the negotiations with AT&T was the staff psychologist who specializes in testing problems. Neither the Acting Director nor any Associate Director from OFCC participated in the negotiations. Interviews with Philip J. Davis, July 23, 1974, supra note 723, and William Kilberg, Aug. 16, 1973, supra note 720. However, after an agreement was reached with AT&T, OFCC officials participated on a Government coordinating committee consisting of representatives from the Department of Justice, EEOC, and OFCC, the Wage & Hour Division, and Office of Solicitor of the Department of Labor, which was established to work out the details of the agreement. According to OFCC and EEOC, GSA was invited to be a member of the coordinating committee. Bierman and Copus interviews, supra note 1055. However, GSA maintained that its participation was to be limited to receiving instructions from the committee and that it was not invited to be a full-fledged member. Mitchell interview, supra note 1055.

GSA withdrew from the committee during the early stages of its meetings. Mitchell interview, supra note 1055. There was, thus, no agency represented on the committee that had the immediate capacity to conduct compliance reviews of AT&T to determine whether it was actually implementing the provisions of the affirmative action plan specified in the agreement. Although the Director of OFCC has the authority to return jurisdiction of AT&T to GSA with instructions concerning the monitoring of the company's compliance (41 C.F.R. § 60-1.25) (1974), this action was not taken because GSA informed OFCC that it would not reassume its responsibilities unless it were given full authority, with no instructions from the committee. Telephone interview with Philip J. Davis, Director, OFCC, Nov. 27, 1973; Mitchell interview, supra note 1055. However, the members of the committee were concerned that compliance reviews adequately investigate the company's implementation of the agreement, and, therefore, refused to return jurisdiction to GSA without certain conditions. In August 1973, when it appeared that an arrangement could not be worked out, OMB staff began to attempt to work out a compromise in which GSA would reassume jurisdiction in cooperation with OFCC but would not receive any instructions from the coordinating committee. Robinson interview, supra note 827. However, as of February 1975, OFCC had still not returned jurisdiction to GSA. Wooten interview (Feb. 26, 1975), supra note 914.

1062. Davis telephone interview (Nov. 27, 1973), supra note 1061; and interview with Bernard Michaels, Equal Opportunity Specialist, OFCC, Aug. 2, 1974. By early 1975 approximately 30 compliance reviews of AT&T facilities had been conducted primarily by personnel from EEOC and GSA. OFCC staff participated in approximately 10 percent of these reviews. Interview with David Copus, Deputy Chief, National Programs Division, EEOC, Mar. 6, 1975.

Delta Airlines was notified as early as July 1970 that it was not in compliance with the requirements of Order No. 4.[1063] Subsequently, Delta and its compliance agency, the Federal Aviation Administration (FAA), held numerous meetings, but Delta repeatedly submitted deficient affirmative action plans. FAA did not issue a show cause notice until June 1971, one year after the initial compliance review.[1064] Fruitless negotiations continued into the fall of 1971, when FAA issued a second show cause notice and at the same time sought permission from OFCC to issue Delta a notice of proposed debarment.[1065] OFCC turned down the request and directed FAA to continue negotiations.[1066]

1063. OFCC Compliance Review Report on Delta Airlines, 7, May 25, 1972.

1064. "Chronology on Delta Airlines/FAA EEO Activity" (undated), from FAA file on Delta Airlines.

1065. Id.

1066. Telephone interview with Richard Baldau, Program Manager, Direct Contracts, Office of Civil Rights, FAA, Dec. 4, 1973.

Two months later, the FAA Atlanta office approved the Delta plan.[1067] The Department of Justice had agreed with FAA to defer initiating a Title VII lawsuit against Delta pending FAA's successful resolution of the deficiencies in Delta's plan.[1068] However, the Justice Department did not learn that the plan had been approved until it wrote to FAA in late November listing what it considered should be the minimum commitments required of Delta.[1069] It was at this point that OFCC assumed jurisdiction of Delta and disavowed the plan accepted by FAA.[1070]

1067. On October 5, 1971, the files of Delta Airlines were returned to the FAA regional office in Atlanta with a memorandum advising the regional staff that, "Determinations concerning Delta's compliance are to be made by your office." Memorandum to Director, Southern Region, ATTN: Chief, Civil Rights Staff, from Leon C. Watkins, Acting Deputy Director of Civil Rights, CR-2, entitled "Delta Airlines, Inc." Oct. 5, 1971. The Director of the FAA Washington Office of Civil Rights stated that he was ordered to return the Delta Airlines files to the Atlanta office by the Deputy FAA Administrator. Telephone interview with Leon C. Watkins, Director, Office of Civil Rights, FAA, Dec. 23, 1971.
FAA Atlanta regional civil rights staff met with Delta officials during the week of October 18, 1971. On October 26, 1971, a new affirmative action plan was submitted and accepted by the Atlanta Regional Office the following day. Memorandum from James C. Rogers, Director, Southern Regional Office, FAA "Delta Airlines, Inc.--Acceptance of Affirmative Action Program," Oct. 29, 1971; OFCC Compliance Review Report, supra note 1063.

1068. In June and July 1971, the Department of Justice conducted an intensive investigation of Delta Airlines and found grounds for initiating a lawsuit under Title VII of the 1964 Civil Rights Act. It deferred such action upon learning of FAA's negotiations with Delta. In October 1971, when Justice Department officials met with representatives of OFCC and FAA, they indicated that although they still had concerns regarding the Delta case they would defer taking legal action. Letter to George Holland, Director, OFCC, from David Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, Mar. 24, 1972.

1069. Rose letter, supra note 1068; telephone interview with Susan Reeves, former attorney in Employment Section, Civil Rights Division, Department of Justice, Nov. 28, 1973.

1070. Letter to W.T. Beebe, President, Delta Airlines, Inc., from John L. Wilks, Director, OFCC, Dec. 8, 1971. On December 15, 1971, a meeting was held between Justice, FAA, and OFCC. The Justice Department indicated that it was still interested in filing a Title VII lawsuit. However, OFCC indicated that it would complete a compliance review of Delta and issue a debarment notice by the end of February 1972. The Justice Department again deferred taking any action. Rose letter, supra note 1068.

The OFCC compliance review report, completed in May 1972, concluded that Delta had serious underutilization of both minorities and women, that certain of its employment practices violated OFCC regulations, and that its affirmative action plan approved in 1971 did not conform with Revised Order No. 4.[1071] OFCC did not, however, initiate any sanctions. Instead, in July 1972, OFCC, EEOC, and the Department of Justice began joint negotiations with Delta.[1072]

Eight months later, Delta reached an agreement with OFCC and the Department of Justice in which it agreed to revise its transfer system, to establish temporary hiring objectives for minorities and women in certain job classifications, and to submit an affirmative action plan within 120 days.[1073] Delta submitted an affirmative action plan to OFCC in August 1973; however, as of July 1974, Delta still did not have an approved plan and no compliance reviews had been conducted of Delta's facilities since February 1972.[1074]

[1071] OFCC Compliance Review Report, supra note 1063. The report found that the plan did not conform with Revised Order No. 4 for a number of fundamental reasons. The plan did not include a table of job classifications, crosstabulated by sex and race, nor an adequate workforce analysis, nor an analysis of applicant flow and transfer and promotion systems. Moreover, the plan did not address itself to the problem of utilization of females at all. Id.

[1072] In March 1973, EEOC withdrew from the negotiations after it was unable to convince the Departments of Justice and Labor to press Delta for settlement terms concerning employees in flight attendant jobs, a category in which EEOC felt there was a female affected class problem. Interview with Jack L. Gould, Attorney, Decisions and Interpretations, EEOC (formerly Attorney in EEOC Office of General Counsel), Aug. 9, 1973. Reeves interview, supra no[illegible]069.

The case history of the government's efforts concerning Delta illustrates one of the major weaknesses in the contract compliance program. Instead of imposing sanctions on contractors who do not follow the affirmative action requirements, the compliance agencies and OFCC devote substantial resources to extended conciliation, which can often stretch out over several years. The Delta case is but one example of the contract compliance program's widespread tolerance of violations of the Executive orders and its virtual failure to impose any sanctions. The message communicated to government contractors is that there is no threat of debarment or other sanctions, and the effect is to obliterate any credibility in the program.

1073. United States v. Delta Airlines No. 181754 (N.D. Ga. 1973) (CCH Emp. Prac. Guide ¶ 5152). The consent decree provided for a transfer system whereby all minorities hired before July 1, 1971, into certain jobs considered less desirable (janitor, maid, skycap, truck driver, maintenance employee) and all women hired before July 1, 1971, into other jobs (switchboard operators, stenographer, and clerk) were to be personally offered an opportunity to transfer into predominantly white or male jobs. Further, lump sum payments ranging from $200 to $1,000, depending on the length of the transferee's service with the company, were to be paid to the first 1,000 transferring minorities and females. The consent decree also specified that the qualification for transfer or advancement of an affected class member would be no higher than that required of the least qualified employee who had succeeded in the job in question. Until an acceptable affirmative action program was developed, Delta agreed to abide by interim hiring objectives, which meant that Delta would attempt to place minorities and women in a certain percentage of vacancies occurring in specified jobs.

1074. In April 1975, the Department of Labor indicated that:

> Preliminary evaluation of the AAP and supporting data as well as the initial quarterly report suggested the need for an on-site review to make a determination on the acceptability of the program. This would most appropriately be done by FAA personnel accompanied by OFCC staff, and that action has been scheduled. Dunlop letter, supra note 726.

VI. The Contract Compliance Program for the Construction Industry

A. Introduction

Approximately three-fifths of all construction workers are hired through referral trade unions.[1075] In 1971, minorities accounted for approximately 15 percent of the total membership in these unions. However, they were heavily concentrated in the lower-paying jobs. While minorities made up 38.6 percent of the membership in the laborer, roofer, and trowel-trade unions, they made up only 5.7 percent of the membership in the mechanical trades, which generally offer the highest-paying jobs.[1076] From 1969 to 1972, minority membership in these higher-paying trade unions was stagnant.[1077] Women are virtually excluded from all construction trades, accounting for less than one percent of total membership.[1078]

From the beginning of the contract compliance program under Executive

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[1075] National and International Labor Unions in the United States, 1969, Bureau of Labor Statistics (BLS) Bulletin 1665, 1970 p. 73, Table 8. A referral union, as defined by the EEOC, is one that performs any of the following functions: operates a hiring hall or hiring office; has an arrangement under which an employer or employers are required to consider or hire persons referred by the union or its agents; has at least 10 percent of its members employed by persons who customarily look to the union, or an agent of the union, for employees to hire. EEOC, Local Union Report EEO-3 (1971).

[1076] EEOC, Local Union Report EEO-3, supra note 1075. The trowel-trades consist of the bricklayers, cement masons, and plasterers. The mechanical trades consist of the boilermakers, electrical workers, elevator constructors, iron workers, plumbers and pipefitters, and sheet metal workers. A third category of construction trades is made up of the asbestos workers, carpenters, lathers, marble polishers, operating engineers, and painters. Minorities made up 8.9 percent of this miscellaneous category in 1971. Id.

1076. EEOC, Local Union Report EEO-3 (1969). Minority union membership in the mechanical trades was 6.2 percent in 1969. Id. EEO-3 data for 1972, which were released in July 1974, indicated that minority membership in mechanical trades rose to 6.9 percent in 1972. Overall membership rose to 15.6 percent. EEOC, Local Union Report EEO-3 (1972); Bureau of National Affairs, Construction Labor Report, No. 978 (July 10, 1974).

[1078] EEOC, Local Union Report EEO-3 (1972), supra note 1077.

Order 11246, the construction industry has been treated separately from the nonconstruction industries covered by the program. OFCC maintains that the distinction is necessary for two reasons. First, the temporary and fluctuating nature of construction work makes it difficult to predict job opportunities and, thus, difficult for the individual contractor to set realistic goals for filling a certain number of the job opportunities with minorities. Second, since the construction industry has made a practice of relying on trade unions for referral of workers, construction contractors, according to OFCC, are generally not able to adopt affirmative action hiring practices independent of the unions.[1079]

Because of these considerations, the OFCC construction compliance program has relied upon areawide plans, either imposed by OFCC or voluntarily designed by contractors, craft unions, and minority organizations to increase minority participation[1080] in the construction workforce of the area as a whole. The provisions of the voluntary plans, called hometown plans, typically include: training, or apprenticeship outreach, programs; goals or ranges of goals, for increasing minority membership in trade unions; nondiscrimination agreements by contractors; and local administrative committees to supervise and coordinate the implementation of the plans.[1081] A hometown plan is developed by the local unions, contractors, and minority groups and is subsequently reviewed by OFCC regional offices and referred to OFCC in Washington for final approval.[1082] If these groups cannot agree to a voluntary hometown plan, OFCC may impose a plan. An imposed plan sets goals for minority utilization in each trade on all Federal and federally-assisted construction projects in the plan area; contractors who fail to meet the goals are subject to sanctions if they cannot demonstrate good faith efforts to meet the goals.[1083]

[1079] Interview with Robert Owens, Associate Director, OFCC, July 23, 1973.

[1080] The OFCC construction program does not address the problem of underutilization of women. See p.345 infra.

[1081] Administrative committees usually consist of an equal number of representatives from the three principal groups, contractors, unions, and minority organizations.

Despite the fact that the Executive orders have prohibited sex discrimination since 1970, the OFCC construction program has ignored the problem of underutilization of women in the construction trades. No hometown or imposed plans have goals for females, nor do any of the OFCC guidelines or instructions relating to the construction program discuss the problem of underutilization of women. The only attempt by OFCC to address the problem of sex discrimination in construction work is an instruction to the regional staff that hometown plans must include a statement indicating that women will be afforded equal opportunity in all areas of employment.[1084]

B. Requirements of Contractors in Hometown Plan Areas

When a hometown plan has been approved, OFCC issues "bid conditions" to all Federal agencies which must be included in the agencies' invitations for bids on construction projects in the hometown plan area.[1085]

[1082] The criteria by which hometown plans are evaluated are discussed on pp.363-66 *infra*.

[1083] Imposed plans are discussed more fully on pp. 351-55 *infra*.

[1084] Memorandum to ESA Regional Administrators and OFCC Regional Area Directors, from Philip J. Davis, Director, OFCC, May 1, 1973.

[1085] Memorandum to Heads of All Agencies, from Philip J. Davis, Acting Director, OFCC, Apr. 10, 1973. Agencies have been required, since 1971, to submit to OFCC monthly reports on their invitations for bids, indicating whether the invitations and the subsequent contracts included the hometown plan specifications and the identity of the low bidder. Memorandum to Heads of Agencies, from John L. Wilks, Director, OFCC, June 18, 1971.

Bidders must comply with the bid conditions in order to be considered "responsive" and, hence, eligible for the award of Federal or federally-assisted construction contracts.

Bid conditions are divided into two principal parts, which set forth two kinds of requirements. Whether the bidder must abide by the first or second part of the bid conditions depends on whether the prospective contractor and its unions are signatories to and comply with the hometown plan.[1086] Part I applies to bidders who are signatories to the plan and who have collective bargaining agreements with labor organizations who are also parties to the plan. Under Part I, a bidder is not required to adopt specific goals for placing minorities on its project so long as all of the trade unions used by the bidder are signatories to the hometown plan and have adopted goals for increasing the participation of minority workers in construction trades.

In contrast, Part II of the bid conditions requires the bidder itself to make specific commitments to abide by goals for utilizing minorities on all of its construction projects. Part II requirements are imposed on bidders who are not signatories to the hometown plan and on those who are signatories to the plan but who have collective bargaining agreements with unions which are not signatories to the plan or which agreed to the plan and subsequently failed to meet the plan objectives.[1087] Signatory bidders must

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1086. Memorandum to Heads of All Agencies from Philip J. Davis, Acting Director, OFCC, Oct. 12, 1972 /hereinafter cited as Memorandum on Model Bid Conditions/. Bid conditions for hometown plans are issued by memorandum to heads of all agencies from the Secretary of Labor. See, for example, hometown plan bid conditions issued in memoranda of June 28, 1971 (Detroit plan); Oct. 14, 1971 (Rhode Island plan) Mar. 7, 1972 (Sacramento plan); and Mar. 27, 1972 (Akron plan.

1087. OFCC audits hometown plans to determine whether minorities are being placed in the craft jobs in the numbers projected by the plan goals. See discussion of OFCC audits on pp. 374-77 *infra*.

abide by Part II requirements only as to those trades whose unions do not participate in the plan or which are in noncompliance with the plan.[1088] Non-union contractors participating in hometown plans must also make specific commitments to goals and timetables.[1089]

Where Part II of the bid conditions applies, if a contractor fails to meet the specified goals for utilizing minorities, then it has the burden of going forward with evidence that it has made "good faith" efforts to meet those goals. To show "good faith," the contractor must at least demonstrate that it has taken specific affirmative action steps in recruiting, participating in minority training programs, and validating employee selection standards. Contractors covered by Part II of hometown plan bid conditions are not, however, required to submit an affirmative action plan.[1090]

1088. Memorandum on Model Bid Conditions, *supra* note 1086. A third part of the bid conditions requires all bidders to indicate the trades to be used on the work under the contract, with a certification that the bidder will comply with the hometown plan for those trades eligible under Part I or that it will adopt the minimum goals of Part II for trades not covered by Part I.

1089. Non-union contractors were not permitted to participate in hometown plans until 1972, when OFCC issued special criteria for such contractors. In addition to goals and timetables, non-union contractors must submit data on their current workforce by race and craft, the total number of hours worked by minorities and nonminorities during the previous calendar year, and letters from the minority community endorsing the contractor's affirmative action plan. Memorandum to ESA Regional Administrators from Philip J. Davis, Acting Director, OFCC, Aug. 18, 1972. Four non-union contractors' affirmative action plans were approved by OFCC during 1972. However, no such plans were approved in 1973 although three non-union contractors submitted affirmative action proposals during that year. Telephone interview with Robert Owens, Associate Director, OFCC, Jan. 3, 1974.

1090. Memorandum on Model Bid Conditions, supra note 1086. As noted on p. 353 *infra*, contractors under imposed plans are required to submit an affirmative action plan.

One of the principal criticisms of the hometown plan approach is that contractors covered by Part I of the bid conditions do not have direct responsibility for affirmative action. So long as the trades are referring minorities to all contractors in the plan area in sufficient numbers to meet the area-wide goals, the contractor itself is not required to establish any goals for minority utilization on its own projects.[1091] In 1972 State and local authorities began to impose supplemental requirements on contractors in hometown plan areas who performed work on projects which were both State- and federally-assisted.[1092] These supplemental requirements imposed a responsibility on the contractor to establish goals.

In response to these developments, the Secretary of Labor issued a memorandum to all agencies instructing them to inform contractors and grantees that supplementary State and local requirements may not be applied to any federally-assisted construction projects.[1093] After three lawsuits were initiated as a result of this policy,[1094] the Department of Labor unofficially proposed an amendment to its regulations that would permit supplemental requirements but only after the State or local government had demonstrated that such requirements would not conflict with the Executive orders.[1095] The Department of Justice and this Commission opposed the proposal on the grounds that it was not authorized by the Executive orders and would effect an unjusti-

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[1091] See, for example, criticism by Herbert Hill, National Labor Director, NAACP, Labor Union Control of Job Training: A Critical Analysis of Apprenticeship Outreach Programs and the Hometown Plans, Occasional Paper, Vol. 2, No. 1, published by the Institute for Urban Affairs and Research, Howard University (1974).

[1092] In 1972, the Massachusetts Office of Transportation and Construction reviewed the Boston hometown plan and determined that it was deficient because it did not require specific commitments from contractors and provided for little enforcement. Subsequently, the Office of Transportation developed a State plan, which required contractors to establish goals for utilizing minorities on their projects. Letter to Philip J. Davis, Acting Director, OFCC, from Alan Altshuler, Secretary of Transportation and Construction, Commonwealth of Massachusetts, Nov. 30, 1972. In 1973, the City of New York declined to participate in the extension of the New York hometown plan and promulgated its own regulations requiring contractors to set ranges of goals for minority utilization in 26 major crafts. New York City Record Feb. 6, 1973.

1093. Memorandum to Heads of All Agencies from Peter J. Brennan, Secretary; Bernard DeLury, Assistant Secretary for Employment Standards; and Philip J. Davis, Director, OFCC, July 19, 1973. This memorandum was held to have been improperly issued and illegal by a Federal District court in July 1974. See pp. 350-57 infra.

1094. During this period of time, the Associated General Contractors of Massachusetts had challenged the right of the Commonwealth to impose goals on contractors participating in the Boston plan. The District court upheld the right of the State of Massachusetts to impose such conditions. Assoc. Gen. Contractors of Mass. v. Altshuler, 361 F. Supp. 1293 (D. Mass. 1973). The Department of Labor considered filing an amicus curiae brief on behalf of the contractors but ultimately took the position that the Massachusetts requirements were not incompatible with the Boston hometown plan and should not, therefore, be struck down. However, the Department of Labor stood firmly by its position that the Secretary of Labor has the authority to nullify any State or local supplemental requirements which he considers to be inconsistent with the Executive orders. Brief for the Secretary of Labor of the United States as Amicus Curiae, Assoc. Gen. Contractors of Mass. v. Altshuler, 490 F.2d 9 (1st Cir. 1973). In October 1973, the NAACP sued the Department of Labor, requesting a court order enjoining the Department from prohibiting the implementation of the New York City regulations. The NAACP argued that the New York City regulations were not inconsistent with the New York hometown plan since that plan was designed only to provide training and did not include hiring goals. Percy v. Brennan, 384 F. Supp. 800 (S.D.N.Y. 1974). Shortly thereafter, the City of New York filed suit against the Department of Labor seeking an injunction permitting the implementation of its regulations. City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974).

1095. Letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, from Richard F. Schubert, Under Secretary of Labor, Oct. 15, 1973. This proposal was circulated for comment to the members of the Equal Employment Opportunity Coordinating Council.

fiable restraint on local governments' equal employment programs.[1096] The regulations ultimately issued in January 1974 provided that local requirements must be submitted to OFCC but would be deemed applicable to federally-assisted contractors unless the Director of OFCC or, in the case of an appeal, the Assistant Secretary for Employment Standards, determines that the supplemental requirements are "inconsistent with the Order or incompatible with" the hometown or imposed plan.[1097] The Director must make a determination as to the compatibility of the supplemental requirements within 60 days of their receipt and must consider such factors as the impact on the Federal area plan, the availability of minority construction workers, the need and availability of training programs and whether the local authorities' procedures provide adequate due process to contractors. Further, the State or local government must assure that its requirements will not result in discrimination.[1098]

On July 23, 1974, in a case brought by the City of New York, a Federal district court ruled that the regulations governing supplemental requirements were void because they were not issued in accordance with the Administrative Procedure Act.[1099] The court further held that the Secretary's memorandum issued in July 1973[1100] was invalid as an unauthorized attempt to preempt State and local equal employment regulation.

[1096] Letters to Richard F. Schubert, Under Secretary of Labor, from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, Dec. 14, 1973, and from John A. Buggs, Staff Director, U.S. Commission On Civil Rights, Nov. 2, 1973.

[1097] 41 C.F.R. § 60-1.4(b)(2), 39 Fed. Reg. 2365 (1974).

[1098] Id.

[1099] City of New York v. Diamond, supra note 1094. This ruling was followed in Percy v. Brennan, supra note 1094.

Between January 1974 and January 1975, supplemental requirements were submitted for OFCC approval in at least 14 instances.[1101] As of February 1975, 12 requests had been approved[1102] but two had been denied, with both denials occuring after the date on which the OFCC regulation was ruled illegal by the Federal district court.[1103]

C. Requirements of Contractors in Imposed Plan Areas

The Part II requirements of bidders in hometown plans are similar to the requirements made of all prospective contractors in areas where OFCC has imposed a plan. As of February 1975, OFCC had imposed plans in only seven cities.[1104]

[1100] See pp. 348-49 supra.

[1101] Requests were received from Illinois; Ohio; the City of Oakland. California; the Port Authority of Oakland; New York City; Boston; San Diego; Detroit; San Francisco; the University of Washington; City of Seattle; Port of Seattle; and Atlanta. Wooten interview (Feb. 26, 1975), supra note 914.

[1102] Wooten interview (Feb. 26, 1975), supra note 914.

[1103] The supplemental requirements imposed by Illinois were disapproved in August 1974 following a ruling by the U.S. Comptroller General that the State's requirements violated Federal procurement law. 54 Comp. Gen. (B167015, July 2, 1974). The request by San Francisco was denied in November 1974 on the grounds that the goals imposed by the local authorities were "substantially higher" than those in the federally-imposed plan. 39 Fed. Reg. 40545 (1974).

[1104] The seven cities were Philadelphia; Washington, D.C.; San Francisco; St. Louis; Atlanta; Camden, N.J.; and Chicago.

All but one of these plans were imposed after OFCC had held public hearings to determine the degree of minority underutilization in the local construction trades, the availability of minorities for construction work, and the projected construction job opportunities in the area.[1105] On the basis of the findings of the hearings, OFCC drew up ranges of goals for each of the trades having underutilization of minorities, which contractors could reasonably be expected to meet if good faith efforts were made.[1106] The term "minorities" is defined in each of the imposed plans to include blacks, Spanish surnamed, Asians, and

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[1105] No hearings were held prior to the imposition of the Chicago plan in late December 1973. 38 Fed. Reg. 35319 (1973). The Philadelphia plan was imposed in 1969. The city's original plan, implemented in 1967, relied on a coordinated effort by compliance agencies and OFCC to obtain affirmative action commitments from the bidder prior to the award. In 1968, the Comptroller General of the United States, in ruling on the legality of a similar plan in Cleveland, held that this procedure was not legal. In 1969, a new Philadelphia Plan was issued which was essentially the model for subsequent imposed plans. For a more detailed discussion of the Philadelphia Plan, see Enforcement Effort report, supra note 691, at 171-72, 201-02; Contractors Ass'n of Eastern Pa. v. Secretary of Labor, supra note 1094. The Philadelphia Plan was extended in January 1975, despite efforts to develop a voluntary plan in that city. 40 Fed. Reg. 1578 (1975). In Washington, D.C., hearings were conducted in April 1970, and a plan was imposed in December 1970. 41 C.F.R. § 60-5 (1974). Hearings were held in San Francisco in December 1970, and a plan was imposed in June 1971. 41 C.F.R. § 60-6 (1974). In St. Louis, hearings conducted in August and September 1970 were followed by an imposed plan in July 1971. 41 C.F.R. § 60-7 (1974). In Atlanta, hearings were held in April 1971, and a plan was imposed the following June. 41 C.F.R. § 60-8 (1974). Hearings were conducted in Camden, New Jersey, in October 1971, but a plan was not imposed until almost two years later. 41 C.F.R. § 60-10, 38 Fed. Reg. 21633 (1973). OFCC staff indicated that it had completed the writing of the plan by mid 1972. Owens interview (Jan. 3, 1974), supra note 1089.

[1106] For example, the San Francisco imposed plan required contractors to establish goals of employing 13 to 15 percent minority electricians on each of their construction projects from May 1, 1973, to April 30, 1974. 41 C.F.R. § 60-6.21(c) (1974).

Native Americans.[1107] OFCC did not determine separately the levels of underutilization of each minority group, nor did it establish separate goals for each group in any of the imposed plans or for men and women within each group. However, available studies indicate that the problems facing each group vary substantially.[1108] The imposed plan regulations prohibit the award of any contract to a bidder who has not submitted a written affirmative action plan with goals at least within the ranges established by the regulations.[1109] Goals must be established for each of the designated trades[1110] and must be applied to all of the prospective contractor's projects during the term of the contract.[1111]

[1107] See, e.g., 41 C.F.R. § 60-5.21(a)(1) (1974).

[1108] For example, blacks tend to be the most severely underutilized in the mechanical trades. EEOC Local Union Report EEO-3 (1972), supra note 1077.

[1109] This requirement applies only to prospective contractors who will perform work on projects with an estimated total cost exceeding $500,000. This figure refers to the cost of the entire project and not to the dollar value of the individual contractor's contract. 41 C.F.R. § 60-5.2; 60-6.2; 60-7.2; 60-8.2; 60-10.2 (1974).

[1110] Goals apply only to the utilization of minorities in trades designated by OFCC as not having adequate utilization of minorities. These are called "critical" trades. Critical trades tend to be those in the mechanical and miscellaneous categories. For example, in Washington, D.C., the mechanical trades designated as critical are the electricians, plumbers, pipefitters and steamfitters, ironworkers, sheetmetal workers, elevator constructors, and boilermakers. The designated trades in the miscellaneous category are the painters, asbestos workers, lathers, glaziers, and tile and terrazo workers. 41 C.F.R. § 60-5.21 (1974). In San Francisco, the designated trades are the electricians, plumbers, metal workers, pipefitters and steamfitters (all of which are mechanical trades) and the asbestos workers (a miscellaneous trade). 41 C.F.R. § 60-6.21.(1974). The Camden imposed plan has the largest number of critical trades, and they fall into all three categories: boilermakers, electricians, elevator constructors, plumbers, pipefitters, sprinkler fitters and sheetmetal workers (mechanical); asbestos workers, carpenters, lathers, operating engineers, painters and decorators, glaziers, and wharf and dock builders (miscellaneous); and bricklayers, plasterers, cement masons, and roofers (trowel-trade) 41 C.F.R. § 60-10.21 (1974).

In order to be held in compliance following the award of the contract, the contractor must either meet its goals or, upon failure to do so, demonstrate that it has made good faith efforts to recruit minorities and to eliminate discriminatory employment practices.[1112] All of the imposed plan regulations provide that a contractor shall be deemed to have met its goals if it has satisfied any of the following criteria: (1) it has actually employed, in each of the designated crafts, the number of minorities projected by the goals; (2) it has shown that it is a member of a construction contractors' association which has as one of its purposes the expanded utilization of minority construction workers and that the total minority participation rate on all projects of all association members falls within the range of the imposed plan goals; or (3) it has shown that the craft unions from which it receives more than 80 percent of its workers are including in their total referrals to all construction projects in the plan area a proportion of minorities which falls within the plan goals.[1113] Thus, the contractor may be excused from any obligation if the trade unions or other construction companies are referring or employing numbers of minorities sufficient to raise the total minority participation rate in the entire area to that of the plan goals.[1114]

[1111] The requirements apply to all of the contractor's construction work, not just that which is a Federal or federally-assisted project. 41 C.F.R. § 60-5.21; 60-6.21; 60-7.21; 60-8.21; 60-10.21.

[1112] In imposed plan areas, or under Part II of hometown plan bid conditions, a failure of the contractor to meet the affirmative action goals automatically results in a show cause notice, which shifts the burden to the contractor to come forward with evidence that it has met the good faith requirements of the regulations. 41 C.F.R. §§ 60-5.2(f); 60-6.2(f); 60-7.30(6); 60-8.30(6); 60-10.30(6). See also Memorandum on Model Bid Conditions (hometown plans), supra note 1068. The procedural advantage to the government triggered by a contractor's failure to meet its numerical goals is different from the procedural provisions applicable to the nonconstruction program. Under Revised Order No. 4, a show cause notice is not automatically issued to the supply and service contractor upon its failure to meet its numerical objectives, 41 C.F.R. §§ 60-2.20 and 60-2.14 (1974). In order to show that it has made good faith efforts, the contractor under Part II must demonstrate that it has carried out all of the provisions of the affirmative action steps in the bid conditions, Memorandum on Model Bid Conditions, supra note 1068.

1113. 41 C.F.R. §§ 60-5.21(c)(2)(i), (ii), and (iii); 60-6.21(c)(2)(i), (ii), and (iii); 60-7.30(2)(a), (b), and (c); 60-8.30(2)(a), (b), and (c); 60-10.30(2)(a), (b), and (c) (1974).

1114. In effect, the second and third criteria provide an opportunity for contractors and unions to develop a hometown plan while operating under imposed plan conditions.

D. Contractors in Non-Plan Areas

For the most part, construction contractors in non-plan areas are ignored by OFCC. Such contractors must adopt the equal opportunity clause, which is required to be in all Federal contracts; but normally they are not subject to any specific affirmative action requirements. OFCC takes the position that its regulation requiring a written affirmative action plan of contractors with 50 or more employees does not apply to construction contractors.[1115] However, OFCC has not issued any written guidelines to this effect.

A few of the compliance agencies regularly require construction contractors in non-plan areas to submit affirmative action plans with goals and timetables;[1116] but OFCC has consistently opposed this practice, taking the position that non-plan contractors may not be subjected to any affirmative action goal requirements.[1117] Since hometown and imposed plans exist in only 70 areas,[1118] a substantial number of construction contractors are virtually free of any requirements.

[1115] 41 C.F.R. § 60-1.4; and 41 C.F.R. § 60-1.40 (1974). This section of OFCC regulations requires all contractors with 50 or more employees and with contracts of $50,000 or more to maintain a written affirmative action plan with goals and timetables. The language of the regulation contains no exemption for construction contractors. Nevertheless, OFCC's interpretation of the regulation is that it is inapplicable to construction contractors. Owens interview (Jan. 3, 1974), supra note 1089. What makes OFCC's interpretation difficult to understand is that in other cases where rules apply only to nonconstruction contractors, the language of the regulations explicitly exempts construction contractors. See e.g., 41 C.F.R. § 60-2.1 (1974).

In 1970, the HUD civil rights staff recommended that all construction contractors, regardless of location, be required to develop affirmative action programs.[1119] The HUD recommendation, which was modeled after Revised Order No. 4, essentially proposed to abandon the hometown plan approach, which places collective responsibility on the contractors, trade unions, and administrative committees, and instead to place the burden of compliance squarely on the shoulders of the contractors. Under the HUD proposal, all construction contractors would be required to develop goals and timetables; if they were unable to meet these objectives because of lack of union cooperation, then OFCC, under its current regulations,[1120] could hold hearings concerning the union's practices and policies or it could recommend to the EEOC that a Title VII action be brought against the union. OFCC never responded to the HUD recommendation.[1121] Even though it never took an official position on the HUD recommendations, OFCC staff indicated that it planned to submit similar proposals at the beginning of fiscal year 1975.[1122] As of February 1975, however, no such proposals had been issued or developed.[1123]

[1116] HUD, HEW, and DOT frequently require construction contractors in non-plan areas to submit affirmative action plans. Interview with Emile Duvernay, Director Hearings Division, Office of Civil Rights, Compliance, and Enforcement, HUD Dec. 24, 1973; Owens interview (Jan. 3, 1974), *supra* note 1089.

[1117] Owens interview (Jan. 3, 1974), *supra* note 1089.

[1118] See note 1140 *infra*.

[1119] Memorandum to John L. Wilks, Director, OFCC, from Samuel J. Simmons, Contract Compliance Officer, HUD, Oct. 13, 1970.

[1120] 41 C.F.R. § 60-1.9 (1974).

E. Development of Hometown Plans Since 1970

The area-wide construction program, which was originally developed in 1966-67, was officially adopted in its present form in February 1970, when the Secretary of Labor announced the selection of 18 target cities in which OFCC would encourage and assist the development of hometown plans and, if necessary, impose plans.[1124] Selection of cities was to be

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1121. Duvernay interview, supra note 1116. In March 1973, at a meeting of agency construction compliance staff, an attempt was made to discuss the HUD proposals, but OFCC refused to permit the discussion. Interview with Joseph M. Hogan, Director, Contractor Equal Opportunity Programs, NASA, Oct. 3, 1973.

1122. Owens interview (Jan. 3, 1974), supra note 1089.

1123. Telephone interview with Peter M. Sliva, Equal Opportunity Specialist, Construction Compliance Division, OFCC, Feb. 26, 1975.

1124. Department of Labor News Release, 11-027, Feb. 9, 1970. These cities were Atlanta, Boston, Buffalo, Cincinnati, Denver, Detroit, Houston, Indianapolis, Kansas City, Los Angeles, Miami, Milwaukee, Newark, New Orleans, New York, San Francisco, Seattle, and St. Louis. OFCC approved hometown plans in Indianapolis and Kansas City in 1970. The following year, plans were approved for Buffalo, Cincinnati, Denver, Detroit, Los Angeles, New Orleans, and New York. In 1972, plans in Boston and Miami were approved. In Atlanta, San Francisco, and St. Louis, plans were imposed in 1971. In Seattle, OFCC placed all contractors under Part II of the bid conditions in 1970; subsequently, a plan was imposed by a court decision in a case brought by the Department of Justice, United States v. Ironworkers Local 86,943 F.2d 544 (7th Cir. 1971). In 1973, OFCC lifted the Part II bid conditions in Seattle, but the court-imposed plan remained in effect. The affirmative action plan developed by the Newark Urban Coalition has been recognized by OFCC as a substitute for a hometown plan. In Milwaukee and Houston, plans have still not been developed.

based on criteria which would identify areas where the program would be most likely to have an impact. Selection criteria were to include labor shortages, the volume of Federal construction, and the availability of minority craftworkers, among other factors.[1125] In the program's actual implementation, however, these criteria were not followed because OFCC did not collect the necessary data. Instead, cities were selected largely in response to requests from minority groups in the areas.[1126] By July, 1970, 73 additional target areas had been selected[1127] and since that time only 12 other areas have been added, bringing the total number of target areas to 103 in 1975.[1128]

[1125] Id.

[1126] Owens interview (July 23, 1973), supra note 1079.

[1127] Department of Labor News Release 11-320, July 9, 1970.

[1128] The other target areas, in addition to the 18 selected in February 1970, were as follows: Hartford, New Bedford, New Haven (Conn.); Rhode Island; Albany, Mount Vernon, Rochester, Syracuse, Long Island (N.Y.); Camden, Trenton (N.J.); Wilmington (Del.); Harrisburg, Philadelphia, Pittsburgh (Pa.); Charleston (W. Va.); Baltimore (Md.); Norfolk, Richmond (Va.); Washington, D.C.; Charlotte (N.C.); Memphis, Nashville (Tenn.); Lexington, Louisville (Ky.); Birmingham, Mobile (Ala.); Biloxi (Miss.); Baton Rouge (La.); Little Rock (Ark.); Dallas, Fort Worth, San Antonio (Tex.); Akron, Cleveland, Dayton, Columbus, Portsmouth, Toledo, Youngstown, (Ohio); Gary (Ind.); Cairo, Carbondale, Peoria, Rockford, Rock Island, Springfield, (Ill.); Minneapolis, St. Paul (Minn.); East St. Louis, Jefferson City, Springfield (Mo.); Des Moines, Waterloo (Iowa); Omaha (Neb.); Wichita (Kan.); Pueblo (Col.); Albuquerque (N.M.); Phoenix, Tucson (Ariz.); Utah; Bakersfield, Fresno, Sacramento, San Bernardino, Riverside, San Diego, Alameda, Contra Costa, Marin, San Mateo, Santa Clara, Seaside-Monterey, Stockton, Vallejo, Ventura, Orange, Santa Cruz (Cal.); Las Vegas, Reno (Nev.); Portland (Ore.); Pasco, Spokane, Tacoma (Wash.); Alaska.

Many of the 103 target areas, however, still do not have approved hometown or imposed plans. As of February 1975, only 50 target areas had hometown plans which had received final approval from OFCC;[1129] six had plans imposed by OFCC;[1130] and one target area had a plan which was court-imposed.[1131] One area had a hometown plan which was developed under the auspices of local authorities but was not recognized by OFCC.[1132] Thus, 45 of the 103 target areas, almost all of which were selected in 1970, still did not have hometown or imposed plans as of 1975.[1133]

[1129] The 50 target areas with approved hometown plans are Boston, New Haven, New Bedford, Rhode Island, Buffalo, Rochester, Syracuse, New York, Long Island, Trenton, Delaware, Pittsburgh, Charlotte, Birmingham, Louisville, Miami, Nashville, Akron, Cincinnati, Cleveland, Dayton, Detroit, Indianapolis, Peoria, Rockford, Toledo, Youngstown, Little Rock, New Orleans, Kansas City, Omaha, Arizona (covering Tucson and Phoenix), Denver, Alameda County, Fresno, Las Vegas, Monterey County, Los Angeles, San Diego, Contra Costa, Santa Cruz, San Mateo, Sacramento, Santa Clara, Alaska, Pasco, Portland, Seattle, Spokane, and Tacoma. Memorandum from Philip J. Davis, Director, OFCC, to Contract Compliance Officers (Dec. 1, 1974); Sliva interview, supra note 1123. OFCC approved the hometown plan of New York City in 1970 and approved an extension of the plan in March 1973. When OFCC's Office of Construction Compliance Operations (OCCO) prepared a summary of the status of hometown and imposed plans as of October 1973, it did not list the New York City plan as having been approved; OCCO, thus, apparently took the position that there was no plan effective in New York City. Office of Construction Compliance Operations, Status of Hometown & Imposed Plans, Oct. 12, 1973. However, the Department of Labor opposed supplemental requirements imposed by the City of New York on the ground that there was an approved hometown plan in that city. See note 1094. supra. In addition to the 50 hometown plans in targeted areas, there were 13 in non-targeted areas, bringing the total number of hometown plans to 63. See note 1139 infra.

[1130] See note 1124 supra. A seventh imposed plan existed in Chicago, which was not a target area.

[1131] Seattle has a court-imposed plan, as well as a hometown plan; United States v. Ironworkers, Local 86, supra note 1124.

In two of the areas without final plans, OFCC headquarters recognized in 1973 that the plan negotiations had reached an "impasse."[1134]

[1132] This city is Newark, N.J. Telephone interview with William Raymond, Associate Director, OFCC, Mar. 19, 1975.

[1133] These 45 areas were Hartford, Albany, Mount Vernon, Baltimore, Charleston, Harrisburg, Norfolk, Richmond, Biloxi, Memphis, Mobile, Lexington, Cairo, Carbondale, Gary, Columbus, Milwaukee, Rock Island, Springfield (Ill.), Portsmouth, Albuquerque, Baton Rouge, Dallas, Fort Worth, Houston, Oklahoma City, San Antonio, Des Moines, Jefferson City, East St. Louis, Springfield (Mo.), Waterloo, Wichita, Pueblo, Utah, Bakersfield, Reno, San Bernardino, Riverside, Stockton, Vallejo, Ventura, Orange County, Marin County, and St. Paul-Minneapolis (OFCC approval of this hometown plan was rescinded on September 28, 1973). Id. In 1971 several compliance agencies conducted reviews of construction projects in Baltimore, which resulted in strong recommendations to OFCC that show cause notices be issued or that an area-wide plan be imposed. No action was taken by OFCC, however. See Maryland State Advisory Committee to the U.S. Commission on Civil Rights, Employment Discrimination in the Construction Industry in Baltimore, (February 1974).

[1134] The two cities in which OFCC headquarters has officially recognized that an impasse has been reached are Gary, Indiana and Memphis, Tennessee. OFCC response, supra note 777. Sims and Reed interview (July 19, 1974), supra note 798. The Region V Director for OFCC indicated that, following the breakdown of negotiations in Gary, he requested OFCC to hold hearings in that city, with a view toward imposing a plan. He stated that his request was denied by the Washington Office. Interview with James Wardlaw, OFCC Region V Director, May 16, 1973 in Chicago, Ill. OFCC headquarters maintains that the request for a hearing did not contain adequate background information. Owens interview (Jan. 3, 1974), supra note 1089.

Nevertheless, OFCC has not held hearings in either of these cities, nor has it imposed plans, despite the existence of a deadlock in the negotiations for two years.[1135] In the remaining 43 target areas, according to OFCC headquarters, plans are still being developed.[1136]

OFCC staff in the regional offices is apparently working on plans in areas other than the 103 target locations, without approval from headquarters.[1137] The Washington office has been unable to direct its field staff to discontinue efforts in non-selected areas and to focus on target areas because it does not have direct authority over the field offices.[1138] As of February 1975, there were approved hometown plans in 13 areas which had not been targeted by OFCC.[1139] Thus, altogether 70 areas were covered by either a hometown or imposed plan as of February 1975.[1140]

[1135] Sliva interview, supra note 1123.

[1136] OFCC response, supra note 777. Interviews with OFCC and ESA officials in the regional offices, however, revealed that the "impasse" situation may well exist in more areas than Gary and Memphis. For example, the Region V Director indicated that such a situation had developed in Milwaukee (which was one of the original 18 target cities selected in 1970). Wardlaw interview, supra note 1034. OFCC staff in the San Francisco office indicated that negotiations had also broken down in six target areas in that region (San Bernardino, Riverside, Stockton, Vallejo, Ventura, and Orange County). Interview with William Dacus, Area Contract Compliance Advisor, San Francisco Area, OFCC, Mar. 22, 1973, in San Francisco, Cal. Moreover, the OFCC staff in Region VI (Dallas) indicated that they had abandoned efforts toward development of plans in Baton Rouge and Fort Worth. Interview with Philip F. Arrien, Regional Administrator, Employment Standards Administration, Department of Labor, Jan. 31, 1973, in Dallas, Tex.

[1137] Owens interview (July 23, 1973), supra note 1079.

[1138] See discussion on p. 257 supra.

[1139] These were Auburn, Westchester County, and Elmira (N.Y.); Evansville (Ill.); South Bend and Fort Wayne (Ind.); El Paso (Tex.); Lawton and Tulsa (Okla.); Topeka (Kan.); Canton (Ohio); Jacksonville (Fla.); and North Bay (Cal.). In addition, there was an imposed plan in Chicago (Ill.), which was not a target area. Sliva interview, supra note 1123.

[1140] Sixty-three areas were covered by a hometown plan, six by an imposed plan, and one (Seattle) by both imposed and hometown plans.

F. OFCC Monitoring of Areawide Plans

1. OFCC Guidelines on Hometown Plans

Once hometown plans are developed, the nearby OFCC regional offices review them. The quality of the hometown plans submitted to OFCC often depends on the strength of the local minority community, since the hometown plan approach places responsibility on the minority community to negotiate with the contractor associations and trade unions to develop the plan. Where the minority community is well-organized and influential, meaningful plans may be developed. Where the minority community is less well-organized, weak plans usually result, if at all.[1141] Therefore, the criteria by which OFCC evaluates these plans prior to approval are especially important.

In May 1973, OFCC issued guidelines to all ESA Regional Administrators and to OFCC Regional Directors outlining general criteria for evaluating hometown plans.[1142] Hometown plans must contain goals and timetables, adequate descriptions of the local committees, background data on the trades, specific commitments by the trades, and a listing of all signatories to the agreement. Prior to this issuance, OFCC headquarters had failed to provide direction to the field offices regarding the necessary ingredients of hometown plans.[1143] Although the guidelines represent progress toward uniform procedures by the regional offices, they nevertheless are deficient in four important respects. First, the guidelines fail to specify that hometown plan goals should be developed for each underutilized group; instead, they specify only that hometown plans should have goals for "minorities."[1144] Second, the guidelines do not require the development of goals for the employment of women[1145] as a class or within each underutilized group. Further, there is no provision requiring the hometown plan parties to agree that selection standards for apprenticeship and journeyperson positions be validated in accordance with OFCC Testing Guidelines.[1146]

[1141] See, for example, New York State Advisory Committee to the U.S. Commission on Civil Rights Hometown Plans for the Construction Industry in New York State (October 1972).

[1142] Davis memorandum of May 1, 1973, supra note 1084.

[1143] Arrien interview, supra note 1136.

Another extremely serious deficiency in OFCC's criteria is the failure to evaluate the plan goals. Goals are developed by the signatory parties and are based on what the parties consider to be "fair and reasonable."[1147] OFCC's guidelines do not provide for evaluation of these goals to determine whether they are reasonable in light of the hiring and promotion opportunities in the construction industry of

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1144. As noted on p. 353 supra, imposed plans suffer from a similar deficiency.

1145. In addition, there are no provisions concerning sex discrimination in the instructions concerning hometown plan audits or imposed plan checks, nor in the proposed compliance review format. See discussion of compliance review format and other surveys on p. infra. The OFCC Program Guidance Memorandum for Fiscal Year 1976 indicates that women will continue to be excluded from the construction compliance program. Fiscal Year '76 Program Guidance Memorandum, supra note 815.

1146. 41 C.F.R. §60-3 (1974). Standards used for selecting persons for apprenticeship programs and for journeyperson positions frequently disproportionately reject minority applicants. See Contract Compliance and Equal Employment Opportunity in the Construction Industry, Transcript of Open Meeting Before the Massachusetts State Advisory Committee to the U.S. Commission on Civil Rights, June 25-26, 1969, at 6, 26, 41, 45 (Dec. 1969). Although the Bureau of Apprenticeship and Training (BAT) of the Department of Labor has adopted regulations requiring that any federally-certified apprenticeship program be nondiscriminatory, 29 C.F.R. § 30, OFCC also has the responsibility to assure that contractors do not rely on trades whose selection standards violate the OFCC guidelines.

1147. OFCC response, supra note 777.

the plan area.[1148]

Further, OFCC does not distinguish between goals for training minorities and goals for placing them in jobs. Frequently, hometown plans merely provide for placing a certain number of minority workers in Outreach programs with no guarantee of union membership or employment in the union-controlled jobs after completion of the training.[1149]

More importantly, there is no indication that OFCC has determined that such training programs are necessary for job performance and not, as some civil rights advocates have alleged, merely additional barriers to minority workers.[1150] Since reports of the Department of Labor indicate that approximately 80 percent of craft union members at the journeyperson level do not obtain their status by participation in an apprenticeship program, it appears that the programs incorporated into hometown plans are not necessary prerequisites for job placement and union membership.[1151] Nevertheless, these

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[1148] Since OFCC does not require evaluation of the goals in terms of actual job opportunities and the availability of minority and female workers, goals may be set which are below what is realistically possible. In some cases, local authorities have imposed higher goals, but this development has been opposed by OFCC. See discussion on pp. 348-51 supra.

[1149] See, for example, the hometown plan for New York City, which has a goal of providing training to 1,000 minorities.

[1150] Hill, supra note 1091, at 65.

[1151] Manpower Report of the President, 1963, Table F-6, p. 198. 1963 was the last year that such information was included in the President's Manpower Report.

Outreach programs continue to receive vast amounts of financial assistance from the Department of Labor. From 1967 to 1972, Outreach programs received approximately $30 million.[1152]

In approving hometown plans, OFCC also fails to investigate other restrictions on membership which are set by the referral unions, such as the passing of oral and written examinations, which may disproportionately reject minority persons. By virtue of collective bargaining agreements which give unions exclusive control over the selection of workers, contractors have adopted or acquiesced in selection standards that may be discriminatory.[1153] Yet OFCC routinely fails to require that these qualification standards be shown to be related to job performance, as is required under the Executive order regulations.

2. Reporting Requirements

The reporting system in effect as of February 1975 required all construction contractors in hometown and imposed plan areas to submit monthly reports, called Monthly Manpower Utilization Reports, to the compliance

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1152. Letter from E. Carl Euhlein Jr., Executive Assistant to the Secretary of Labor, to Herbert Hill, National Labor Director, NAACP, May 22, 1972. See also a brief discussion of Manpower Administration funding of audited hometown plans on p. _infra_.

1153. Federal courts have frequently found craft union examinations and selection standards to be unlawfully discriminatory. _See_, _e.g._, United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); United States v. Iron Workers Local 86, _supra_ note 1124, and United States v. Local 638 Steamfitters, 360 F. Supp. 979 (S.D.N.Y. 1973).

agencies which are instructed to forward copies to OFCC.[1154] The Monthly Manpower Utilization Reports, also called Optional Form 66, show the total hours of employment and the total hours of minority employment, by each trade and minority group, at each of the contractors' Federal or federally-assisted construction sites. The major inadequacy in this reporting system is its failure to collect summary information on minority participation in the contractor's work force as a whole. Since a contractor under imposed plans or Part II of hometown plan bid conditions must meet requirements placed on its entire work force, neither compliance agencies nor OFCC can make a determination on the basis of a single project report whether the contractor appears to be in compliance. Compilation of the data from the individual reports is made difficult because the contractor submits different project reports to different

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1154. Memorandum to Heads of All Agencies from John L. Wilks, Director, OFCC, June 18, 1971. The compliance agencies are directed to issue a show cause notice if the contractor fails to submit the Monthly Manpower Utilization Report. Id. OFCC does not have data on the number of instances in which contractors have failed to submit the report. Davis interview (July 23, 1974), supra note 728; Sliva interview, supra note 1123.

agencies, which in turn do not always submit copies to OFCC. In addition, OFCC has developed no computer or other mechanized system for compiling the information.[1155] This reporting system is also deficient because it does not show the names or other identifications of the minority individuals working on the sites and thus does not permit OFCC or the agencies to verify during onsite reviews whether the minority individuals are or have been actually employed on the construction project.[1156]

In June 1972, the compliance agencies were requested to participate on a task force for developing a better reporting system for the construction program.[1157] A meeting was held in August 1972 out of which developed several task forces, directed by representatives of various compliance agencies. A proposed compliance review format and reporting procedures were developed as a result of this effort.[1158]

1155. The problems of the reporting system are more fully discussed in an administrative complaint filed with OFCC in early 1974. Letter to Philip J. Davis, Director, OFCC, from Russell W. Galloway, Jr., Legal Aid Society of Alameda County (undated). Telephone interview with Russell Galloway, Sept. 26, 1974. See also Memorandum to Philip J. Davis, Director, OFCC, from William Dacus, Area Contract Compliance Advisor, OFCC, Region IV, Apr. 12, 1973.

1156. Owens interview (July 23, 1973), *supra* note 1079. Compliance officials have found that minority individuals are frequently moved from one construction project to another during the course of a compliance review, with the result that they are often mistakenly counted toward the contractor's goals more than once. Identification of the minority individual would prevent such double counting. *Id*.

1157. Memorandum to Heads of All Agencies, from Philip J. Davis, Acting Director, OFCC, Aug. 10, 1972.

1158. Memorandum to Contract Compliance Officers, from Philip J. Davis, Acting Director, OFCC, Jan. 4, 1973.

The recommended reporting system, requiring contractors to list the names and social security numbers of the minority employees, was implemented on an experimental basis only.[1159] Testing of the reporting form was conducted by the HEW construction compliance staff, but HEW officials were instructed to discontinue the test project because of contractors' objections that the new form was too burdensome for them to complete.[1160] As of February 1975, no alternative procedures had been developed to correct either of the deficiencies in the reporting system.[1161]

In hometown plan areas a reporting requirement also is placed on the administrative committees. Since February 1973, OFCC has required hometown plan administrative committees to submit monthly reports giving the names, work status, and craft of each minority placed into a local trade.[1162] Failure of the committee to report this information is grounds for revocation of OFCC approval of the hometown plan. A few committees have neglected to meet this reporting requirement, but OFCC has not revoked approval of the plan in any of these instances.[1163]

1159. Id.

1160. Owens interview (July 23, 1973), supra note 1079. OFCC, in addition to establishing the agency task force on new reporting procedures, also established a task force made up of representatives from contractor associations. This task force apparently did not object to the new reporting form until the testing project was implemented. According to OFCC staff, there were plans also to establish task forces made up of union representatives and representatives of concerned minority organizations. These plans, however, were never implemented. Id.

1161. Sliva interview, supra note 1123.

1162. Memorandum to Administrative Committees, from Philip J. Davis, Acting Director, OFCC, Feb. 2, 1973.

1163. Owens interview (Jan. 3, 1974), supra note 1089.

3. Compliance Reviews and Other Surveys of Construction Contractors

There are three types of onsite surveys conducted in the construction program: (1) reviews conducted by compliance agencies of individual contractor facilities; (2) OFCC hometown plan audits, which determine the number of minorities placed in construction work in the plan area; and (3) OFCC compliance checks of imposed plans to ascertain the number of minorities currently working on construction projects.

In 1971, OFCC instructed the compliance agencies to conduct compliance reviews of all Federal and federally-assisted construction projects and to review, on a random basis, the non-federal construction sites of contractors covered by the Executive orders.[1164] OFCC did not, however, issue any guidelines to the agencies on the proper procedures for conducting these reviews, and, as a consequence, the agencies developed their own procedures.[1165] In fiscal year 1973, more than 3,000 reviews of construction projects were carried out,[1166] with no guidance, supervision, or review by OFCC.[1167]

[1164] Memorandum to Heads of Agencies from John L. Wilks, Director, OFCC, June 19, 1971.

[1165] Owens interview (July 23, 1973), supra note 1079.

[1166] OFCC Summary of Monthly Progress Reports, Fiscal Year 1973.

[1167] Owens interview (July 23, 1973), supra note 1079. None of these compliance reviews were analyzed by OFCC to determine their adequacy.

When the compliance agency task forces met in August 1972 to develop new contractor reporting procedures, they also drew up a standardized construction compliance review format. OFCC submitted this format for comment to all agencies in January 1973[1168] but has delayed its implementation on the ground that it must be introduced simultaneously with the new contractor reporting procedures.[1169] The proposed compliance review format is designed to determine the actual number of minorities placed and working on the reviewed contractor's construction project at the time of the review and to give guidance to the compliance agencies on the issuance of show cause notices.[1170]

If adopted, the standardized procedures would require compliance agencies to begin the review by requesting the contractor to submit for offsite analysis a written account of the affirmative action steps taken, copies of its EEO policy statement and of all collective bargaining agreements, and a list of all of its construction sites and subcontractors.[1171] The contractor would be directed to have available for onsite inspection copies of payroll records; lists of all employees by minority-nonminority, by craft, and by job classification; and a description of the referral sources used.[1172]

[1168] Davis memorandum of Jan. 4, 1973, supra note 1158.

[1169] Owens interview (July 23, 1973), supra note 1079; Sims and Reed interview (July 19, 1974), supra note 798; Sliva interview, supra note 1123.

[1170] The compliance review format applies to reviews of all construction contractors, regardless of whether they are located in a plan area. The contractor reporting requirements, however, apply only to contractors in hometown and imposed plan areas.

[1171] Davis Memorandum of Jan. 4, 1973, supra note 1158.

The proposed procedures include a number of deficiencies. For example, there is no instruction to tabulate data from the personnel and payroll records in order to review employment patterns over a period of time. Nor are directions included regarding the need to check the contractor's Monthly Manpower Utilization Reports against its employment records. The proposed format also fails to include procedures for determining whether any of the contractor's employment practices are discriminatory.[1173] There are no instructions concerning the method by which to review the collective bargaining agreement to determine whether any of its provisions may adversely affect minorities.[1174]

Further, the instructions on reviewing the affirmative action program are inadequate. The compliance officer is directed to determine whether the contractor's affirmative action program is "satisfactory," but few standards are set forth by which the program should be evaluated.

1172. *Id*. Data would also be collected on the type of training available to minorities and the cost of the total project as well as its stage of completion. The proposed procedures also instruct the compliance officers to interview at least one minority and one nonminority in each skilled and trainee classification to determine how the individual was referred and treated on the job, his or her status within the trade, and the opportunity for the individual to advance.

1173. For example, payroll records are to be examined in order to cross check the number of minorities listed in the personnel records, but not to examine the relative wage levels of minorities and nonminorities.

1174. Davis memorandum of Jan. 4, 1973, *supra* note 1158. For example, apprenticeship programs can be an integral part of a collective bargaining agreement; the standards for selection into apprenticeship programs, as well as the standards for placing persons in journeyperson positions, should be scrutinized by the compliance officer to determine whether they have an adverse effect on minorities and, also, whether they have been validated pursuant to OFCC's Guidelines.

The proposed format fails to address such factors as the contractor's contact with minority organizations or participation in training programs. More importantly, the format totally ignores the necessity of reviewing the selection standards used in screening applicants. In addition, there are no provisions in the proposed format instructing the compliance officer to consider whether the contractor has practiced sex discrimination or whether women are underutilized in the contractor's workforce.[1175] Finally, the format does not take into account non-union contractors, who must establish goals and timetables in order to participate in a hometown plan.[1176]

Following the completion of the compliance review report, the agency is directed to determine whether the contractor is in noncompliance and, therefore, subjected to the issuance of a show cause notice. The standaridized review format establishes guidelines on the proper issuance of showcause notices.[1177] Such notices are to be issued to contractors in imposed plan areas if they have not met their goals for minority utilization. In hometown plan areas, contractors under Part II of the bid conditions are also subject to show cause notices for failure to achieve their goals. Under the proposed procedures, contractors subject to Part I of the bid conditions would be issued show cause notices for refusal to cooperate with the administrative committe in accepting trainees.[1178]

1175. Id.

1176. See note 1089 supra.

1177. Davis memorandum of Jan. 4, 1973, supra note 1158. Any contractor may receive a show cause notice for failure to submit a Utilization Report or upon a finding that it maintains racially segregated facilities.

1178. Davis memorandum of Jan. 4, 1973, supra note 1158. Part I of the bid conditions does not require the bidder to establish goals in order to be deemed a responsive bidder.

Contractors in non-plan areas may receive show cause notices if they are found to have failed to employ "a sufficient number"[1179] of minorities in a given craft. No guidance is given to the agencies as to what constitutes a "sufficient number." Moreover, since contractors in non-plan areas are not required to establish goals and timetables prior to the award of the contract, under the proposed procedures, such contractors could be issued show cause notices without advance notice as to the level of minority utilization which should exist in their workforces.[1180]

While the compliance agencies have the responsibility for conducting reviews of individual construction projects, OFCC is responsible for conducting reviews of the progress made under hometown and imposed plans. In auditing a hometown plan, OFCC requests from the administrative committees lists of the name, craft, and employer of all individuals placed in construction work in the plan area during the previous year. OFCC auditors then interview these persons to determine their race or ethnicity and to verify their placement and length of service. The hometown plan is credited with having placed a minority if the individual minority member was placed 90 days prior to the OFCC approval date of the plan, or later, and has worked for at least 30 days.[1181]

1179. Davis memorandum of Jan. 4, 1973, supra note 1158.

1180. Id.

1181. OFCC response, supra note 777. OFCC credits a plan with having placed a minority, even if the person is placed before the plan is approved, because there are often delays in OFCC approval of the plan after the parties have developed and implemented it. Owens interview (Jan. 3, 1974), supra note 1089.

A person who has worked for only 30 days on a project should not be considered a permanent addition to the construction industry, particularly since most employers require work experience of at least three months.[1182] For this reason, and because no distinction is made between union and non-union members or between job categories,[1183] the OFCC placement credit concept is deficient.

From May through September 1973, OFCC carried out its first comprehensive auditing of hometown plans. Altogether 44 plans were audited. The results of 39[1184] of these audits were made public in late October and early November 1973, when reports were sent to each of the administrative committees.[1185] Since OFCC does not evaluate goals in terms of job opportunities and the availability of minorities for the jobs, it is not clear that minorities have made any meaningful gains even in those hometown plan trades which met their goals. However, even measured by their own goals, hometown plans are a failure.

[1182] Interview with Herbert Hill, National Labor Director, NAACP, Aug.30, 1974.

[1183] For example, whether the person was placed as a journeyperson, apprentice, or trainee.

[1184] Audit data on four of the plans (Denver, Tacoma, Alaska, and New York City) were never released. The results of the audit of the Chicago hometown plan were never officially released, but the OFCC Director is reported to have stated that although the plan goal was 1,457, OFCC auditors were able to identify only 205 minorities who had been placed. Construction Labor Report, No. 942 (Oct. 24, 1973). OFCC imposed a plan in Chicago in late December 1973 41 C.F.R. 60-11, 38 Reg. 35319 (1973). The audit of New York City plan was completed in September 1973 and a report was submitted to OFCC on November 20, 1973, which indicated that 88 percent of the plan goal had been reached /the audit found that 886 minorities were placed in training programs; the total goal was 1,000/. Memorandum to Philip J. Davis, Director, OFCC, from George M. Hopkins, Associate Assistant Regional Director, ESA, New York Regional Office, Nov. 20, 1973. However, these data were never determined to be accurate by OFCC headquarters and were never released. Sims and Reed interview (July 19, 1974), supra note 798.

[1185] Letters were sent from Philip J. Davis, Director; OFCC, to the chairpeople of the administrative committees. See, for example, letter to Mr. William Cleary, Boston, Oct. 30, 1973; Mr. Robert Johnson, Providence, Oct. 30, 1973; Mr. Hamilton Klie, Cleveland, Oct. 30, 1973; and Mr. Joseph Vasquez, Santa Clara, Oct. 30, 1973.

Only six of the hometown plan areas obtained or exceeded their total goals.[1186] In four of these plans, at least half of the participating trades fell short of their objectives.[1187] Seventeen of the audited plans reached from 50 to 99 percent of the total plan objectives,[1188] while 16 did not reach even half.[1189] In all but five of the audited plans, one half or more of the trades were found not to have achieved their goals.[1190] Altogether, 335 of the 478 participating trades fell short of their promised objectives.

OFCC audits found that a total of 3,102 minorities had been placed in construction work in the 39 cities.[1191] More than $4 million in

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1186. These were Syracuse, Cinncinnati, Dayton, South Bend, El Paso, and Tulsa. Three of these (Dayton, South Bend, and Tulsa) received no funding from the Manpower Administration. Syracuse, Cincinnati, and El Paso received $159,000, $289,000, and $106,000 respectively. See Table E of the Appendix to this chapter.

1187. The four were Syracuse, Cincinnati, Dayton, and South Bend.

1188. These were Boston, Delaware, Pittsburgh, Miami, Nashville, Akron, Detroit, Evansville, Indianapolis, Rockford, New Orleans, Kansas City, Omaha, Las Vegas, Sacramento, Pasco, and Spokane.

1189. These areas were New Haven, Rhode Island, Buffalo, Rochester, Trenton, Westchester County, Charlotte, Cleveland, Peoria, Little Rock, Topeka, Alameda County, Fresno, Monterey, Santa Clara, and Portland.

1190. The five plans in which more than one half of the trades succeeded in obtaining their goals were Sacramento, El Paso, Tulsa, Miami, and Rockford. See Table E of the Appendix to this chapter.

1191. The OFCC audit data on minorities placed included 11 persons placed in crafts in El Paso which were exempt from the plan's coverage, one person placed in a craft which was not signatory to the Little Rock plan, and 39 persons placed in five hometown areas (Tulsa, South Bend, Cincinnati, Santa Clara, and Miami) into crafts for which goals had not been established in the hometown plan. Because these 51 placement credits did not count toward meeting any of the established goals, they should be deducted from the total in any analysis of the success of the plans in meeting their objectives.

Manpower Administration funds were allocated to these cities;[1192] thus, an average of $1.308 was expended for each minority worker placed on a construction project.[1193]

When the results of these audits were released, OFCC notified the administrative committees that each of the 335 trades found not to have met its goals would be placed under Part II of the bid conditions unless the trade could show that good faith efforts had been made to meet its objectives.[1194] The administrative committees were given 10 days in which to respond. Altogether, OFCC received approximately 120 letters from administrative committees, building trade associations, or business agents of unions.[1195] These letters pertained to only 206 of the 335 trades failing to meet their goals.[1196] More than seven months after the responses had been due, OFCC announced that it was placing under Part II of the bid conditions 100 of the trades which had failed to meet their goals.[1197] According to OFCC, the remaining 226 trades were not placed under Part II of the bid conditions because it was determined that there were not sufficient job opportunities in the labor area or the trade had shown sufficient good faith efforts in recruitment.[1198] However, 82 of these 226 trades (or 36 percent) failed to respond in any way to the 10 day notices issued in the fall of 1973.[1199] Thus it is difficult to understand how OFCC made the determination that such efforts had been made by these trades. The following table shows the total number of local trades participating in the 39 hometown plans for which audit data were released by November 1973; the number of locals in each trade category which failed to meet their goals; and the number of these which were placed under Part II of the Bid Conditions.

[1192] The administrative committees of the plans have been funded in the past by the Manpower Administration of the Department of Labor. In the future, such committees will be funded through the Manpower Revenue Sharing Program. Interview with William Kacvinsky, Chief, Division of Program Administration, Manpower Administration, Department of Labor, Aug. 22, 1973. Although OFCC coordinates the development of the plans and gives them final approval, it plays not part in the funding of the committees set up to supervise and administer the plans. Owens interview (July 23, 1973), supra note 1079. According to Mr. Owens, most plans require funding of no more than $75,000 to operate adequately. Id. Thus, approximately 13 of the 24 funded plans appear to have been overfunded. See Table E of the appendix to this chapter.

[1193] See Table E of the Appendix to this chapter. This figure does not take into account approximately $2 million funded to the Denver and Chicago plans, for which data on minority placement were not released.

[1194] Letters to Administrative Committees, supra note 1185.

[1195] Simms and Reed interview (July 19, 1974), supra note 798.

[1196] See, for example, letters to Philip J. Davis, Director, OFCC, from Robert Kroth, Business Representative, Glaziers and Glass Workers Local 387, Cincinnati, Ohio, Oct. 31, 1973; George W. Puthuff, Business Manager, Lathers International Union Local 44, San Jose, California, No. 6, 1973; and Bruce M. Chapman, Business Manager, Plumbers and Steamfitters Local 246, Fresno, California, Nov. 9, 1973.

1197. Memorandum to Heads of All Agencies from Philip J. Davis, Director, OFCC, July 2, 1974. This memorandum lists 100 trades which are described as being placed under the more stringent bid conditions as of that date for failure to meet goals. However, two of the listed trades in Pittsburgh (Painters and Tile and Terrazzo workers) were already under Part II bid conditions. Letter to Mr. Nate Smith, President, Pittsburgh Building Construction Industry, from Philip J. Davis, Director, OFCC, Nov. 7, 1973. In addition, eight of the trades had actually met their goals, according to OFCC's Audit report letters. These were as follows: Asbestos Workers, Cement Masons, Electrical Workers, Glaziers, Lathers, Roofers (Boston); Asbestos Workers (Delaware); and Plasterers (Kansas City). Letters to Mr. William Cleary, Mr. James H. Sear, and Mr. Louneer Pemberton from Philip J. Davis, Director, OFCC, Oct. 30, 1973. Thus, actually only 90 of the 326 trades which failed to meet the voluntarily set goals were placed under the Part II Bid Conditions.

1198. Davis interview (July 23, 1974), supra note 728.

1199. Those trades which failed to respond to the 10 day notice and which have been permitted to remain under the voluntary provisions of the hometown plan are listed in Table F of the Appendix to this chapter.

Trade	No. Participating In 39 Audited Hometown Plans x	No. of Trades Failing To Meet Goals xx	No. of Trades Placed Under Part II Of The Bid Conditions xxx
Mechanical			
Plumbers & Pipefitters	43	34	8
Sheetmetal Workers	31	22	2
Electrical Workers	30	18	6
Ironworkers	22	16	2
Boilermakers	10	10	3
Elevator Constructors	13	7	0
Steamfitters	7	5	1
Pile Drivers	1	1	0
Sprinklerfitters	5	5	0
Subtotal	162	118 (72.8% of 162)	22 (18.6% of 118)
Miscellaneous			
Asbestos Workers	20	12	5
Carpenters	35	28	12
Lathers	23	11	4
Operating Engineers	28	19	3
Painters	36	29	9
Glaziers	28	24	12
Carpet & Linoleum Workers	7	5	2
Tile & Terrazzo & Marble Workers & Helpers	16	13	7
Millwrights	5	4	3
Art Glass Workers	1	1	1
Teamsters	9	4	0
Dry Wall Finishers	2	1	0
Floor Layers	2	2	0
Stone Masons	1	0	0
Riggers	1	0	0
Subtotal	214	153 (71.4% of 214)	58 (37.9% of 153)
Trowel, Roofer, & Laborers			
Bricklayers	33	24	9
Plasterers & Cement Masons	51	26	7
Roofers, Kettlemen & Helpers	28	13	4
Laborers & Hod Carriers	2	1	0
Subtotal	114	64 (56.1% of 114)	20 (31.2% of 64)
Total	490	335 (68.5% of 490)	100 (29.7% of 335)

x. See Table E in appendix of this report *infra*.

xx. Letter to Administrative Committees, *supra* note 1185.

xxx. Davis memorandum of July 2, 1974, *supra* note 1179.

As can be seen from the foregoing table, the mechanical trades, in which minority underutilization is the most severe,[1200] more frequently failed to meet their goals than did other categories of trades. Despite the evidence that these trades are most in need of government monitoring, OFCC did not place them under Part II of the bid conditions nearly as often as it did trades in other categories that failed to meet their goals.

Compliance checks of imposed plans are designed to determine the number of minorities working on Federal or federally-assisted construction projects in the imposed plan area. OFCC regional staff begin a compliance check by obtaining from the regional offices of Federal agencies the names and exact locations, as well as the dollar value, of each Federal and federally-assisted construction project in the plan area. During the onsite compliance check, the compliance officer ascertains the total workforce of both the prime contractors and the subcontractors; the crafts employed on the job at the time of the check; the minority representation in the "critical crafts," or those crafts covered by the ranges of goals in the regulations; and the total minority workforce, by name, craft, job classification, length of service on the job, and length of membership in the union. A compliance check requires approximately three weeks, after which a report is sent to the OFCC Director summarizing the findings.[1201]

During the fall of 1973, compliance checks were conducted of Federal and federally-assisted construction sites in five imposed plan areas in which there were altogether 48 critical crafts.[1202] As the following tables show, of these crafts, 19, or 39.5 percent, were found not to be complying with the ranges of goals required by the imposed plan. The checks did not investigate contractors' work forces on non-Federal sites, although these are covered by the Executive orders.

[1200] See p. 343 supra.

[1201] Owens interview (Jan. 3, 1974), supra note 1089.

[1202] The five plans checked were Atlanta, Washington, St. Louis, San Francisco and Philadelphia. See tables on pp. 381-83 infra.

Findings of the Compliance Check of the Atlanta Imposed Plan (August 13-19, 1973) 1203

Craft	Total Workforce	Minority Workforce	Percentage Minority	Range of Plan Goals 1204
Asbestos Workers	0	0	-	23.5% - [illegible]3.5%
Carpenters	294	72	24%	14.6% - 18.3%
Electrical Workers	154	30	19%	11.3% - 14.9%
Elevator Constructors	8	1	12%	10.8% - 14.1%
Glaziers	2	0	0%	23.7% - 31.6%
Ironworkers	95	13	14%	7.9% - 10.1%
Millwrights	14	2	14%	10.7% - 14.0%
Painters	47	19	40%	17.7% - 22.4%
Plumbers	101	18	18%	11.5% - 14.8%
Sheetmetal Workers	14	5	36%	14.4% - 19.2%
TOTAL	729	160		

Findings of the Compliance Check of the Washington, D.C. Imposed Plan (August 26-27, 1973) 1205

Craft	Total Workforce	Minority Workforce	Percentage Minority	Range of Plan Goals 1206
Electricians	614	162	26%	28% - 34%
Painters/Paperhangers	73	24	32%	35% - 42%
Plumbers/Pipefitters/ Steamfitters	618	113	18%	25% - 30%
Ironworkers	384	58	15%	35% - 43%
Sheetmetal Workers	217	41	18%	25% - 31%
Elevator Constructors	89	17	19%	34% - 40%
Asbestos Workers	72	18	25%	26% - 32%
Lathers	72	17	24%	34% - 40%
Boilermakers	13	0	0%	24% - 30%
Tile & Terrazzo Workers	22	9	40%	28% - 34%
Glaziers	12	1	8%	28% - 34%
TOTAL	2,186	460		

1203. U.S. Department of Labor, Region IV, News Release, April 29, 1974.

1204. 41 C.F.R. § 60-8.30 (1974)

1205. These data were unofficially released to the Washington Post, which published them on December 11, 1973. Although the Department of Labor has never issued a formal report on the Washington plan compliance check, OFCC staff verified the accuracy of the data published in the Washington Post.

1206. 41 C.F.R. § 60-5.21(1974)

Findings of the Compliance Check of the St. Louis Imposed Plan (August 27-31, 1973)[1207]

Craft	Total Workforce	Minority Workforce	Percentage Minority	Range of Plan Goals[1208]
Asbestos Workers	9	2	22%	4.2% - 4.7%
Boilermakers	2	0	0%	26.6% - 30.3%
Bricklayers	50	5	10%	9.4% - 11.0%
Carpenters	254	33	13%	5.2% - 6.7%
Cement Masons	28	3	11%	8.7% - 11.0%
Electrical Workers	95	13	14%	8.5% - 11.1%
Elevator Constructors	8	0	0%	5.6% - 7.2%
Glaziers	0	0	0%	17.2% - 23.0%
Ironworkers	47	4	9%	6.2% - 7.6%
Lathers/Plasterers	19	2	10%	15.2% - 19.7%
Operating Engineers	50	9	18%	8.2% - 10.7%
Painters	30	8	27%	15.6% - 20.4%
Plumbers/Pipefitters	125	12	10%	8.4% - 10.6%
Roofers	18	1	6%	12.1% - 14.6%
Sheetmetal Workers	42	5	12%	13.5% - 18.0%
Tile & Terrazzo Workers	2	0	0%	5.6% - 7.2%
TOTAL	779	97		

Findings of the Compliance Check of the San Francisco Imposed Plan (September 17-21, 1973)[1209]

Craft	Total Workforce	Minority Workforce	Percentage Minority	Range of Plan Goals[1210]
Asbestos Workers	0	0	0%	27% - 33%
Electrical Workers	120	42	35%	13% - 15%
Ironworkers	47	9	19%	15% - 17%
Plumbers/Pipefitters/ Steamfitters	160	39	24%	10% - 12%
Sheetmetal Workers	44	10	23%	15% - 17%
TOTAL	371	100		

[1207] Office of Federal Contract Compliance, May 10, 1974 (internal memorandum provided to Commission staff by the office of the Director, OFCC).

[1208] 41 C.F.R. § 60-7.21 (1974).

[1209] Office of Federal Contract Compliance, May 10, 1974, supra note 1207.

[1210] 41 C.F.R. § 60-6.21 (1974).

Findings of the Compliance Check of the Philadelphia Imposed Plan (September 24-28, 1973) 1211

Craft	Total Workforce	Minority Workforce	Percentage Minority	Range of Plan Goals 1212
Electrical Workers	264	36	14%	19% - 23%
Elevator Constructors	71	9	12%	19% - 23%
Ironworkers	105	26	24%	22% - 26%
Plumbers/Pipefitters	127	16	12%	20% - 24%
Steamfitters	73	15	20%	20% - 24%
Sheetmetal Workers	73	13	18%	19% - 23%
TOTAL	713	115		

OFCC regulations require that a show cause notice be issued to contractors whose critical crafts fail to meet the imposed plan goals.[1213] However, as of September 1974, OFCC had not instructed any of the compliance agencies to take this action.

Further, OFCC was considering permitting a voluntary hometown plan to replace the imposed plan in Washington, D.C., even though that imposed plan had accounted for almost half (nine) of the 19 noncomplying crafts. The Washington imposed plan was due to expire in May 1974, but OFCC delayed the expiration date, thereby postponing the implementation of a hometown plan which had been proposed.[1214] OFCC should have instructed

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1211. Office of Federal Contract Compliance, May 10, 1974, supra note 1207.

1212. Id. In contrast to the other imposed plans, the terms of the Philadelphia plan were never published as a regulation.

1213. See note 1110 supra.

1214. Davis interview (July 23, 1974), supra note 728. As of February 1975 the Washington plan had been extended to August 1975. 40 Fed. Reg. 4308 (1975).

compliance agencies immediately following the compliance check to issue show cause notices requiring contractors with deficiencies in the critical trades to come forward with evidence of their good faith efforts to comply with the plan. More than a year after the compliance check, however, OFCC had initiated no enforcement action and was, instead, considering relieving contractors of their individual responsibility as provided in the imposed plan.

In general, the OFCC construction compliance program has suffered from a near total absence of enforcement. Since the Executive order became effective in 1965, only five construction contractors have been debarred.[1215] Each of these was a small specialty contractor with fewer than 50 employees.[1216] Only one of the five was located outside an imposed plan area, and that contractor was reinstated after six months.[1217] Each of the remaining four debarred contractors was covered by the imposed plan in Philadelphia.

Thus, based on the nine-year history of the program, large general contractors, except possibly those in Philadelphia, have no reason to believe that sanctions will be imposed for Executive order violations.

Moreover, unions, which are not covered by the Executive order,[1218] have little incentive to cooperate under either imposed or voluntary plans. While OFCC has the authority to refer noncomplying unions to EEOC for possible Title VII litigation,[1219] it has not used this authority since fiscal year

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1215. See note 913 supra.

1216. Owens interview (Jan. 3, 1974), supra note 1089.

1217. This contractor was Dial Electric Co. of Denver. See note 913 supra.

1218. See p. 255 supra.

1219. Before March 1974, such referrals could also be made to the Department of Justice, which until that date had concurrent authority with EEOC over private employees and unions. See Chapter 5 of this report.

1972.[1220]

In sum, OFCC's own data indicate that a substantial portion of contractors and unions are failing to meet their contractual commitments under both hometown and imposed plans. In the face of this evidence, however, OFCC has taken virtually no enforcement action.

1220. Davis interview (July 23, 1974), supra note 728.

TABLE A

Staffing Ratios and Performance of Compliance Agencies—Fiscal Year 1972

Agency	No. of Contractor Facilities* (non-construction only)	Estimated No. of employees in Contractor Facilities* (non-construction only)	FY 1972 Budget Authorized by OMB** for non construction program	Ratio of Authorized Budget to No. of facilities	Ratio of Authorized to No. of Employees in Contractor Facilities
AID	1,100	409,000	126,000	$114.54	.30
AGRIC	13,600	2,300,000	624,000	45.60	.27
AEC	4,000	1,600,000	1,205,000***	301.25	.75
COMMERCE	800	250,000	508,000	635.00	2.03
DOD	12,400	22,000,000	5,436,000	438.38	.24
GSA	20,700	unknown	1,119,000	54.05	----
HEW	8,840	9,400,000	854,000	97.00	.09
INTERIOR	3,060	630,000	679,400	222.02	1.08
NASA	250	240,000	422,000	1,688.00	1.76
DOT	660	273,000	151,000	228.78	.55
TREAS.	3,900	700,000	311,000	79.74	.44
VA	2,200	350,000	398,000	180.90	1.14

* "Brief Discussion of the Contract Compliance Program and Significant findings of Budget Analysis," OMB, Dec. 1971.

** OFCC response to CRC questionnaire and OFCC Summary of Monthly Progress Reports.

*** Includes construction Program.

**** Estimate based on report of 150 reviews over 6 month period.

***** Based on report of 86 reviews over 3 month period.

TABLE A 1972 (Continued)

Agency Staff level Authorized by OMB** for non-construction program	Ratio of No. of Facilities to Authorized Staff Level	Ratio of Auth. Staff Level to No. of Employees	Budgeted No. of Compliance Reviews, Non-Construction Cont'r Facilities	Actual No. of Compl. Reviews, Non-Construction Cont'r Facilities**	% Obtained	% Facilities Reviewed
8	137.5	51,125	122	90	74%	8.2%
38	357.9	60,526	418	397	94	2.9
51	78.4	31,372	477	300****	62	7.5
24	33.3	10,416	245	235	96	29.4
345	35.9	63,768	6,327	5,619	88	4[illegible]3
79	262.0	------	2,776	1,884	68	9.1
88	107.8	174,634	159	482	300	5.4
48	63.8	13,125	251	354*****	141	11.6
20	12.5	12,000	167	188	112	75.2
5	132.0	54,600	116	247	212	37.4
20	195.0	35,000	275	248	90	6.4
22	100.0	15,909	392	796	254	45.3

TABLE II

Staffing Ratios and Performance of Compliance Agencies

Fiscal Year 1973

1973 Agencies	Estimated Number of Contractor Facilities*	Estimated Number of employees in Contractor Facilities*	FY 1973 Budget Authorized by OMB**	Ratio of Authorized Budget to Number of Facilities	Ratio of Authorized Budget to Number of Employees in Contractor Facilities	Agency Staff Level		Ratio of Authorized Staff level to number of facilities
						Authorized by OMB**	Actual*	
AEC	4,154	1,448,716	$1,467,000	$ 353	$ 1.01	98	98	42.4
AGRIC.	18,571	2,218,892	816,000	43	.36	50	45	371.4
AID	1,100	79,000	181,000	165	2.29	9	9	122.2
COMMERCE	450	300,000	659,000	1,464	2.19	61	61	7.4
DOD	50,000	40,000,000	7,863,000	157	.20	558	403	89.6
EPA****	2,000	Not Known	476,000	238	--	35	35	57.1
GSA	20,000	2,670,000	2,647,000	132	.99	174	124	114.9
HEW	6,538	881,300	4,281,000	655	4.85	202	142	32.3
HUD****	10,000	Not Known	2,304,400	230	--	134	50	74.6
INTERIOR	3,600	Not Known	1,895,000	513	--	78	52	46.2
JUSTICE	72	1,280	16,682	232	13.03	--	2	--
NASA	250	47,531	519,000	2,076	10.91	37	37	6.8
POSTAL SERV.	20,000	Not Known	1,555,000	78	--	88	88	227.2
SBA****	413	12,961	161,000	390	12.42	9	Not Reported	45.8
DOT	8,629	922,139	1,866,000	216	2.02	123	123	70.2
TREASURY	19,000	800,000	708,000	42.	.88	35	19	526.3
TVA***	60	Not Known	14,000	233	--	2	1	30.0
VA	2,200	Not Known	644,000	293	--	38	35	
TOTALS	167,037							

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* Estimates taken from OFCC 1976 Planning Guidance Memorandum, supra note 815 and from interviews listed in note 850 supra.

** Memorandum to Heads of All Agencies from Philip J. Davis, Director, OFCC, "Contract Compliance Program Guidance Memorandum," Apr. 30, 1973.

*** Summary of Monthly Progress Reports (1973)

**** Agency has responsibility primarily for construction contractors.

T A B L E B - 1973 (Continued)

Ratio of Number of facilities to Actual Staff Level	Budgeted Number of Compliance Reviews**	Actual Number of Compliance Reviews***	Percent Obtained	Percent of Facilities Reviewed	Number of Show Cause Notices Issued***	Percent of Reviews in which show cause notices issued	Number of Affirmative action plans approved***
42.4	693	523	75%	12.6%	18	3.4%	690
412.7	900	216	24	1.1	0	0	975
122.2	180	56	31	5.0	2	3.5	131
7.4	362	230	64	51.0	29	12.6	204
124.1	10,000	9,149	91	18.2	123	1.3	6,926
57.1	1,088	1,648	151	82.4	57	3.4	429
161.3	5,674	4,132	72	20.6	157	3.8	2,706
46.0	6,670	422	6	6.4	16	3.0	326
200.0	3,897	1,628	42	16.2	204	12.5	2,626
69.2	863	270	31	7.5	26	9.6	223
36.0	None	Not Reporting	--	--	--		
6.8	900	319	35	106.0	0		269
227.2	4,350	819	18	4.0	0		--
--	473	Not Reporting	--	--	--		Not Reporting
70.2	1,375	1,616	118	18.7	61	3.8	1,361
1,000.0	1,000	404	40	2.1	0		404
60.0	25	2	8	3.3	0		0
	750	391	52	17.7	5	1.2	133
		21,825			698	3.2	17,402

TABLE C

Staffing Ratios and Performance of Compliance Agencies Fiscal Year 1974

Agency	Estimated number of contractor facilities *	Estimated Number of employees in contractor facilities*	FY '74 Budget Authorized by OMB**	Ratio of Authorized budget to number of facilities	Ratio of Authorized budget to Number of contractor employees	Staff level authorized by OMB**	Ratio of authorized staff level to number of facilities
AEC	4,177	1,448,716	1,920,000	$ 459.66	$ 1.32	89	46
AGRIC	18,571	2,218,8[illegible]2	816,000	43.93	.36	50	371
AID	1,200	79,000	237,300	197.50	3.00	11	109
COMMERCE	380	300,000	659,000	1,734.21	2.19	31	12
DOD	50,000	40,000,000	8,827,000	176.54	.22	570	88
EPA****	2,000	Not Known	571,000	285.50	-----	14	142
GSA	20,000	2,670,000	3,140,000	157.00	1.18	188	106
HEW	6,538	881,300	5,156,000	788.06	5.85	244	26
HUD****	10,000	Not Known	2,149,600	214.96	-----	125	80
INTERIOR	4,638	Not Known	1,845,000	397.80	-----	78	59
JUSTICE***	86	Not Known	36,600	425.58	-----	2	43
NASA	250	47,531	534,000	2,136.00	11.23	29	8
POSTAL SERVICE	20,000	Not Known	1,569,000	78.45	-----	235	85
SBA	413	12,961	241,000	583.53	18.59	14	30
DOT	8,629	922,139	1,954,000	226.44	2.12	135	64
TREASURY	19,000	800,000	789,000	41.52	.98	35	542
TVA****	60	Not Known	21,000	350.00	-----	2	30
VA	2,200	Not Known	652,000	296.36	-----	38	58
Totals	168,142					1,738	

* Estimates taken from OFCC 1976 Planning Guidance Memorandum, *supra* note 815 and from interviews listed in note 850 *supra*.

** Memorandum to Heads of All Agencies from Philip J. Davis, Director, OFCC, "Contract Compliance Program Guidance Memorandum," April 30, 1973.

*** Interview with George Travers, Associate Director, OFCC, July 24, 1974.

**** Agency has responsibility primarily for construction contractors.

T A B L E C - 1974 (Continued)

Ratio of authorized staff level to number of employees	Budgeted number of compliance reviews**	Actual number of compliance reviews***	Percent obtained	Percent of Facilities Reviewed	Number of show cause notices issued***	Percent of reviews in which show cause notice issued	Number of Affirmative Action Plans approved***
16,277	763	592	64.4%	14.2%	16	2.7%	561
44,378	733	565	77.0	3.0	12	2.1	565
7,182	210	49	23.3	4.0	12	24.4	49
9,677	357	146	40.8	38.4	0	0	146
70,175	6,299	3,825	60.7	7.6	64	16.7	3,712
-----	1,690	272	16.0	13.6	20	7.4	259
14,202	5,095	2,523	49.5	12.6	147	5.8	1,973
3,610	2,491	377	15.1	5.7	26	6.8	377
-----	1,530	1,338	87.4	13.4	38	2.8	884
-----	959	577	60.1	12.4	5	.8	428
-----	10	Not reporting	----	----	Not reporting	---	Not reporting
1,639	545	122	22.3	48.8	0	0	105
-----	572	Not reporting	----	----	Not reporting	---	Not reporting
432	450	Not reporting	----	----	----	---	Not reporting
-----	500	1,309	261.0	15.2	97	7.4	1,114
22,857	1,500	385	25.6	2.0	1	.2	385
-----	16	19	118.0	31.6	0	0	6
-----	395	148	37.4	6.7	6	4.0	146
		12,247			444 = 3.6% of 12,247	3.6	10,710 = 87%

TABLE D

Comparison Of Compliance Agency Budgets With Incidence Of Show Cause Notices *

Agency	Number of Reviews Conducted in FY 1974	FY 1974 Budget	Cost Per Review	Percent of Reviews in Which Show Cause Notice Issued
AEC	592	$1,920,000	$ 3,243.24	2.7
AGRICULTURE	565	816,000	1,444.25	2.1
AID	49	237,300	4,842.86	24.4
COMMERCE	146	659,000	4,513.70	0
DOD	3,825	8,827,000	2,307.71	16.7
EPA	272	571,000	2,099.26	7.4
GSA	2,523	3,140,000	1,244.55	5.8
HEW	377	5,156,000	13,676.39	6.8
HUD	1,338	2,149,600	1,606.58	2.8
INTERIOR	577	1,845,000	3,197.57	.8
DOJ	**	**	**	**
NASA	122	534,000	4,377.05	0
POSTAL SERVICE	**	1,569,000	**	**
SBA	**	241,000	**	**
DOT	1,309	1,954,000	1,492.74	7.4
TREASURY	385	789,000	2,049.35	.2
TVA	19	21,000	1,105.26	0
VA	148	652,000	4,405.41	4.0

* Data are drawn from Table C
** Information not available

TABLE E*
Hometown Plans: Federal Funding, Participating Trades, and Performance In Meeting Objectives

Hometown Plans Target Areas	Amount of Manpower Adm. Funding	Goal for Plan Year (FY 1973)	Number of Minorities Placed	% of goal Obtained	Date of Audit	Estimated Dollar Value of Federal Construction in plan area	Total no. of Trades Participating In the Plan	No. of trades not meeting their goals	No. of Trades placed under Part II of bid conditions in July 1974
Boston	$420,235	351	249	70%	5/73	No estimate	18	11	10
New Haven	$ 35,000	184	27	14	6/73	$203,000,000	8	8	6
New Bedford	Not funded	Ranges of Goals	No Audit	---		No estimate	--	--	
Rhode Island	$ 35,000	100	5	5	6/73	No estimate	11	11	10
Buffalo	$349,520	183	88	48	8/73	$141,000,000	19	13	2
Rochester	$218,749	108	29	26	7/73	No estimate	11	10	
Syracuse	$159,658	38	38	100	5/73	No estimate	22	11	
New York City	Not funded	1,000	Data not released	---	9/73	No estimate	--	--	
Long Island	Not funded		No Audit			No estimate	--	--	
Trenton	$ 35,000	74	9	12	6/73	No estimate	10	7	5
Delaware	$ 56,038	41	21	51	5/73	$92,000,000	9	9	5
Pittsburgh	$320,000	304	173	56	6/73	No estimate	17	14	4
Charlotte	Not funded	46	18	37	6/73	No estimate	10	6	
Birmingham	Not funded	132	No Audit			No estimate	--	--	
Louisville	Not funded	68	No Audit			No estimate	--	--	
Miami	Not funded	126	86	68	5/73	No estimate	17	8	
Nashville	$ 35,000	68	54	79	7/73	No estimate	13	8	
Akron	Not funded	40	20	50	5/73	No estimate	13	7	4

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* Data were drawn from OFCC response, supra note 777; from OFCC Audit reports, supra notes 1184 and 1185, and Davis Memorandum, supra note 1197.

TABLE E (Continued)

Hometown Plans Target Areas	Amount of Manpower Adm. Funding	Goal for Plan Yr.	Number of Minorities Placed	% of goal Obtained	Date of Audit	Estimated Dollar Value of Federal Construction in plan area	Total no. of Trades Participating In the Plan	No. of trades not meeting their goals	No. of trades placed under Part II of bid conditions in July 1974
Cincinnati	$289,000	131	134	102%	8/73	No estimate	17	10	--
Cleveland	$438,111	425	109	25	6/73	$50,000,000	16	16	14
Dayton	Not funded	60	65	108	6/73	$13,000,000	13	7	5
Detroit	$422,056	303	300	99	5/73	$770,129,455	16	8	--
Indianapolis	$452,732	288	221	76	9/73	No estimate	16	12	2
Peoria	Not funded	104	32	30	7/73	$151,471,466	13	12	--
Rockford	Not funded	23	18	78	8/73	No estimate	6	3	--
Toledo	Not funded	455	No Audit	---	--	No estimate	--	--	--
Youngstown			No Audit	---		No estimate	16	--	--
Little Rock	$ 85,760	87	36	41	6/73	No estimate	11	9	--
New Orleans	$193,454	240	186	78	5/73	No estimate	11	7	1
Kansas City	$128,743	259	213	82	5/73	No estimate	21	12	7
Omaha	$ 35,000	93	65	70	6/73	No estimate	16	8	1
*Arizona	Not funded	Ranges of goals	No Audit	--	--	No estimate	--	--	--
Denver	$336,642	300	Improper Audit	--	5/73	No estimate	--	--	--
Alameda	$ 35,000	172	70	40	5/73	No estimate	7	7	6
Fresno	Not funded	57	19	33	7/73	No estimate	12	10	8
Las Vegas	$ 35,000	131	94	72	6/73	No estimate	9	4	--

*Includes Tuscon and Phoenix

TABLE E (Continued) Hometown Plans Target Areas	Amount of Manpower Adm. Funding	Goal for Plan Year	Number of Minorities Placed	% of goal Obtained	Date of Audit	Dollar Value of Federal Construction in Plan areas	Total no. of Trades Participating in the Plan	No. of Trades not meeting their goals	No. of Trades Placed under Part II of bid conditions in July 1974
San Mateo									
Los Angeles									
Contracosta									
Monterey	Not funded	78	26	33%	6/73	No estimate	5	5	
San Diego	Not funded	967	No Audit	--	--	No estimate	--	--	
Santa Cruz	Not funded	Ranges of goals	No Audit	--	--	No estimate	--	--	
Sacramento	$35,000	154	124	80	8/73	No estimate	11	6	
Santa Clara	$35,000	104	21	20	7/73	No estimate	12	10	3
Alaska	Not funded	228	Improper Audit	--	5/73	No estimate	--	--	
Pasco	$49,800	73	38	52	6/73	No estimate	11	10	
Portland	Not funded	134	23	17	6/73	No estimate	19	18	
Spokane	Not funded	104	94	90	8/73	No estimate	9	6	
Tacoma	Not funded	75	Improper Audit	--	7/73	No estimate	--	--	
Seattle-King									

TABLE E (Continued)

Hometown Plans in Non-Target Areas	Amount of Manpower Adm. Funding	Goal for Plan Yr.	Number of Minorities Placed	% of goal Obtained	Date of Audit	Estimated Dollar Value of Federal Construction in plan area	Total no. of Trades Participating In the Plan	No. of trades not meeting their goals	No. of trades placed under Part II of bid conditions in July 1974
Auburn (N.Y.)	Not funded	20 in two yrs.	No Audit	--	--	No estimate	4	--	
Elmira (N.Y.)	Not funded	57	No Audit	--	--	No estimate	--	--	
Westchester County	Not funded	89	35	39%	6/73	$65,000,000	7	7	1
Jacksonville	Not funded	Ranges of goals	No Audit	--	--	No estimate	--	--	
Canton	Not funded	129	No Audit	--	--	No estimate	--	--	
Chicago*	$1,700,000	1,457	205	--	8/73	No estimate	--	Not available	
Evansville	$ 55,000	64	54	84	7/73	$28,000,000	12	7	2
South Bend	Not funded	59	62	105	8/73	No estimate	10	5	
Fort Wayne	Not funded		No Audit	--	--		9	--	
El Paso	$ 106,341	36	121	330	6/73	No estimate	9	3	
Lawton	Not funded	92	No Audit	--	--	No estimate	--	--	
Tulsa	Not funded	40	57	142	8/73	No estimate	11	5	2
Topeka	Not funded	61	29	48	6/73	No estimate	12	10	2
North Bay (Calif.)								336	100

*Plan imposed in December 1973

TABLE F

HOMETOWN PLAN TRADES WHICH DID NOT RESPOND TO OFCC 10-DAY NOTICES AND WHICH HAD NOT BEEN PLACED UNDER PART II OF THE BID CONDITIONS AS OF JULY 1974*

Boston	Boilermakers
	Ironworkers
	Sprinklerfitters
New Haven	Carpenters
	Elevator Constructors
Providence	Electrical Workers
	Operating Engineers
Buffalo	Steamfitters
Syracuse	Carpet Layers
	Asbestos Workers
	Cement Masons
	Elevator Constructors
	Glaziers
	Painters
	Plumbers
	Sheetmetal Workers
Trenton	Bricklayers
Westchester	Painters
	Roofers
	Teamsters
Pittsburgh	Asbestos Workers
	Carpenters
	Cement Masons
	Ironworkers
	Lathers
	Operating Engineers
	Plasterers
	Plumbers
	Roofers
	Sheetmetal Workers
	Sprinklerfitters
	Steamfitters
Akron	Asbestos Workers
	Electrical Workers
	Sheetmetal Workers

Cincinnati	Pipefitters
Cleveland	Elevator constructors
Indianapolis	Painters
	Sheetmetal Workers
Peoria	Glaziers
Tulsa	Glaziers
	Plumbers
	Sheetmetal Workers
Kansas City	Glaziers
	Painters
	Plumbers
	Sprinklerfitters
	Teamsters
Topeka	Plumbers
	Cement Masons
Alameda	Painters
Fresno	Bricklayers
	Ironworkers
Monterey	Carpenters
	Plasters/Cement Masons
	Plumbers/Pipefitters
	Roofers
Sacramento	Glaziers
Santa Clara	Bricklayers
	Lathers
	Painters
	Sheetmetal Workers
	Plasterers
Pasco	Boilermakers

Portland	Asbestos Workers
	Boilermakers
	Carpenters
	Carpet and Linoleum Workers
	Drywall Finishers
	Elevator Constructors
	Glaziers
	Ironworkers
	Operating Engineers
	Painters
	Plumbers
	Sheetmetal Workers
	Steamfitters
	Teamsters
Spokane	Bricklayers
	Painters
	Plumbers
	Sheetmetal Workers

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* Commission staff compiled this listing from the committees' letters and other correspondence located in OFCC files.

Chapter 4

DEPARTMENT OF LABOR (DOL)

WAGE AND HOUR DIVISION

Equal Pay Act Enforcement

I. Introduction

Women have long constituted a major part of the labor force in the United States. In 1900, for example, women comprised 18.1 percent of the total number of persons employed;[1221] and by 1945, they accounted for 29.6 percent of the labor market.[1222] By 1965, women were 34 percent of all civilian workers.[1223] According to the 1970 census there were 29,170,127 gainfully employed women, representing 37.7 percent of the total 77,308,792 employed.[1224]

Despite the important role of women in the economy, the discriminatory practice of paying women less than men for performing the same or substantially similar work--unequal pay for equal work--has been longstanding and pervasive. For example, data show that in 1868 the American Telephone and Telegraph Company employed 80 female telegraphers at a monthly salary of $30 to $50, while men received an average of $75 and several even received over $100 for performing the same or substantially equal work.[1225] In the mid-1800's, women clerks in the U.S. Department of the Treasury earned $900 per year while male clerks received from $1,200 to $1,800. Female bookkeepers in New York, around 1868, could only expect a yearly salary of $500, while men earned almost $2,000.[1226]

[1221] Hearings before the Joint Economic Comm., Economic Problems of Women, 93d Cong., 1st Sess., pt. 1, at 105 (1973).

[1222] *Id.*

[1223] *Id.* This period saw a significant increase in the number of women employed. From 1947 to 1967, employment rose from 69.9 to 80 million. Women accounted for 58.8 percent of the growth. For an examination of this period see, V. Clover, *Changes in Differences in Earnings and Occupational Status of Men and Women: 1947-1967* (1970).

[1224] U.S. Department of Commerce, Bureau of the Census, *Characteristics of the Population*, vol. 1, pt. 1, 679 (1973). The data cover only the civilian labor force.

Similar equal pay abuses existed in the 20th century. Male teachers in 1939, for example, were paid $1,953, while their female colleagues received $1,394 per year; male social workers earned $1,718, compared to $1,442 earned by women annually.[1227] Male electrical workers, in 1947, received an average annual salary of $3,267, while women took home only an average of $2,377.[1228] By 1950, the Bureau of Labor Statistics found that male general clerks' salaries ranged from $46 per week to $60.50, yet women general clerks' salaries were as low as $40.50 per week and not higher than $55.[1229]

[1225] Women and Child Wage Earners Report, S. Doc. No. 645, 61st Cong., 2d Sess. 241 (1909-1910).

[1226] Id. at 239-40. See also, P. Van Riper, History of the United States Civil Service 159 (1958).

[1227] W. Chafe, The American Woman: Her Changing Social, Economic, and Political Roles, 1920-1970 61 (1972).

[1228] Hearings on H.R. 4273 and H.R. 4408 before Subcomm. No. 4 /Wages and Hours of Labor/ of the Committee on Education and Labor, 80th Cong, 2d Sess. 195 (1948).

[1229] Hearings on H.R. 1548 and H.R. 2438 Before the Special Subcomm. on Equal Pay for Women of the Comm. on Education and Labor, 81st Cong., 2d Sess. 14 (1950).

The pattern of unequal pay continued to rise in the 1950's. For example, women earned only 63.3 percent of men's earnings in 1956; the disparity was even higher for some specific skills.[1230] For such positions as managers and officials, the disparity was 40.9 percent; female managers and officials, in other words, earned 59.1 cents for every dollar earned by men in similar positions. Female sales workers earned 41.8 percent of the amount earned by male sales workers.[1231] By 1960, women still earned only 60.7 percent of the amount earned by men. Among managers and officials, women earned 52.9 cents for every dollar earned by men; and female sales workers earned 40.9 percent of the earnings of male sales workers.[1232]

Overall disparities between the wages paid men and women in particular categories of employment resulted from a number of factors. A significant part of the differential was caused by a variety of forms of sex discrimination including equal pay inequities. For example, research conducted in Chicago during the 1950's and 1960's showed that part of the disparity between mean salaries of men and women in four select occupations--accountants, tabulating machine operators, punch-press operators, and janitors---could only have been due to sex discrimination:[1233] adjusting salaries for non-sex-related factors, the study showed an 8 to 18 percent difference between women's and men's wages.[1234]

[1230] Economic Problems of Women, supra note 1221 at 104.

[1231] Id.

[1232] Id.

[1233] D. McNulty, Differences in Pay Between Men and Women, 90 Monthly Labor Review 40-43. For an analysis, see J. Madden, The Economics of Sex Discrimination (1973).

[1234] McNulty, supra note 1232.

The railroad industry was probably the first large scale employer to guarantee women equal pay in its employment practices.[1235] On May 25, 1918, the U.S. Railroad Administration's Railroad Wage Commission issued General Order No. 27 which stated, in part, that, with regard to women railroad workers, "...their pay, when they do the same class of work as men, shall be the same as that of men."[1236] By 1919, the States of Montana and Michigan had become the first governments to pass equal pay legislation.[1237] Although the Federal Government had enacted some equal pay legislation,[1238] its efforts related solely to Federal employment and an equal pay law covering the private sector was not adopted until 1963.

In June 1963, President John F. Kennedy signed the Equal Pay Act (EPA).[1239] The Act required that women and men receive equal pay for equal

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1235. Women had been employed by the railroads since 1830.

1236. Quoted in U.S. Department of Labor, Women's Bureau, Case Studies in Equal Pay for Women 6 (1951).

1237. Ch. 147, § 1, (1919) Laws of Montana Sixteenth Legislative Assembly 288; Title 41 Revised Codes of Montana § 1307 (1947). Act 239 Michigan Compiled Laws Ann. § 750.566 (1963).

1238. Congress in the late 1800s enacted legislation affecting Federal "female clerks." This and subsequent legislation pertaining to equal pay and the Federal civil service is discussed in P. Van Riper, supra note 1225. Questions of equal pay were raised by the National War Labor Boards of World War I and II. For a discussion of the World War 1, War Labor Board rules see, U.S. Department of Labor, Report of the Secretary of the National War Labor Board 69 (May 31, 1919). For a discussion and critical analysis of the World War II War Labor Board's rulings see, Hearings Before Subcomm. No. 4, supra note 1228, at 84.

1239. 29 U.S.C. § 206(d)(1970).

work and prohibited salary differentials solely on the basis of sex. It was incorporated into an existing labor law, the Fair Labor Standards Act of 1938 (FLSA).[1240]

It is always the hope of lawmakers that the mere proscription of certain behavior will, within a reasonable period of time, result in broad compliance, and that enforcement efforts can gradually be reduced as voluntary efforts to come into conformity with the statute increase. This, however, does not appear to have been the case with regard to equal pay violations. By 1972, 9 years after enactment of the EPA and other even more comprehensive Federal anti-sex discrimination statutes, significant wage inequities continued to exist on a large scale. The 1972 full-time yearly median wage for female sales workers was $4,575 compared with $11,356 for men.[1241] Female professional and technical workers received a median income of only $5,993 while men received $10,258.[1242]

Moreover, DOL reports that charges of sex discrimination made under the EPA have increased since 1963, as has DOL's prosecution of private employers for violations.[1243] In 1969, DOL investigated 385 business

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1240. 29 U.S.C. §§ 201-219 (1970). DOL has found 142,597 persons have been discriminated against between 1964 and 1973 under the EPA, at a cost of $65,578,000. Economic Problems of Women, supra note 1230, at 92.

1241. U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 90, Dec. 1973. The income disparities between women and men employed in the same industry are often as significant as those within occupational categories. Women craftworkers and operatives working in manufacturing industries, for example, earned 46 percent of men in those positions in the industry and in the construction industry women earned 49 percent of the amount earned by men. U.S. Commission on Civil Rights Staff Report, Women in Poverty 17, 18 (June 1974).

1242. Id.

1243. Interview with Betty Southard-Murphy, Wage and Hour Administrator, DOL, Oct. 22, 1974.

establishments against whom complaints were filed for EPA violations, finding 960 employees underpaid at a cost of $156,202. In 1973, DOL found that 29,619 employees working in 2,095 establishments were underpaid a total of $18,005,582.[1244]

DOL has found numerous types of violations committed by employers in almost every industry covered by the Act. In one of the largest decisions handed down by the courts under the EPA, for example, AT&T was found to traditionally place women in sex-segregated positions with lower base salaries than men. When women were promoted to positions of equal skill, effort, and responsibility with men, AT&T added an equal, fixed sum to the base salaries of both men and women. Since female salaries were always lower, the resultant wage was not equal for the equal work, and resulted in an EPA violation.[1245] In 1973 Corning Glass Works[1246] was found to have consolidated seniority lists into male and female categories which resulted in giving men a higher seniority rating.

[1244] Memorandum from Morag Simchak, Special Assistant to the Assistant Secretary of Labor for Employment Standards, DOL, to ESA Compliance Personnel, January 1974.

[1245] Equal Employment Opportunity Commission v. American Telephone and Telegraph Co., 365 F. Supp. 1105 (D.C. Pa. 1973). By this consent decree AT&T agreed to pay $7.5 million due in back wages under EPA to 3,000 female employees.

[1246] Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973), *aff'd sub. nom.* Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

This allowed men to be placed on the night shifts at Corning where they were paid higher wages than women for doing the same or substantially equal work, thus constituting an equal pay violation.[1247] Similarly, in 1973, Robert Hall Clothes, Inc.,[1248] was found to have prevented women from working in the higher sales volume and commission areas of their clothing stores. As a result, their salaries were lower although they did essentially the same jobs as male sales workers.

DOL officials estimate that there will be 100 million persons working by 1980, 40 percent or more of whom may be women, and that as female employment rises EPA violations will increase.[1249] It is, therefore, clear that enforcement of the EPA is unquestionably as important now as it was in 1963.

[1247] _Id_.

[1248] Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3d Cir.), _cert_. _denied_ _sub_. _nom_. Brennan v. Robert Hall Clothes, Inc., 414 U.S. 866 (1973).

[1249] Interview with Bernard DeLury, Assistant Secretary for Fair Labor Standards, DOL, Nov. 26, 1974.

II. Responsibilities

The Equal Pay Act amended the FLSA, which had been enforced and administered by the Department of Labor since 1938.[1250] The FLSA provides that workers must be paid a minimum wage,[1251] that if required to work long hours they be paid at an overtime rate,[1252] and that children may be employed only under conditions which rigidly protect their health and safety.[1253] The EPA adds the requirement that employees performing equal work must be paid equal wages regardless of sex.[1254]

[1250] The EPA was incorporated into the older statute because of the history and experience of the government, business, and workers with the FLSA. It was thought to be the easiest and most effective course of action to incorporate it into an already existing DOL enforcement structure. Equal Pay Act of 1963, H.R. Rep. No. 309, 88th Cong., 1st Sess. 688 (1963).

[1251] 29 U.S.C. § 206(a) (1970).

[1252] 29 U.S.C. § 207 (1970).

[1253] 29 U.S.C. § 212 (1970).

[1254] 29 U.S.C. § 206(d)(1) (1970). This section provides that:

> No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs in the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions....

Coverage of the FLSA is broadly defined. Generally, the provisions of the EPA apply to employers who are, "engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce...,"[1255] and under certain circumstances, whose annual gross volume of sales is not less than $250,000.[1256] Activities of all public agencies are also covered.[1257] Any retail or sales establishment is also subject to the EPA/minimum wage section of the FLSA.[1258]

Such definitions of coverage make the EPA applicable to large numbers of employers and employees. Industries such as telecommunications, retail sales, manufacturing, construction, hospitals, educational institutions, and activities of public agencies have been affected by the EPA. The Act serves to protect the equal pay rights of over 72.5 million employed women and men.[1259]

1255. 29 U.S.C. § 206(a)(1) (1970). See also comment, "Scope of Coverage under the Fair Labor Standards Act of 1938," 30 Wash. and Lee L. Rev. 149 (1973).

1256. 29 U.S.C. § 203(s)(1) (1970).

1257. 29 U.S.C. § 203(s)(5) (1970).

1258. 29 U.S.C. § 213(a)(2) (1970).

1259. Telephone interview with Kerry Helmeke, Division of Evaluation and Research, Office of Program Development and Accountability, ESA, DOL, Feb. 7, 1975. This figure shows coverage based on 1973 data but includes 1974 coverage.

There are, however, some exceptions to the FLSA minimum wage section of which the EPA is a part. For example, EPA protections do not apply, under certain circumstances, to employees of the recreation industry;[1260] segments of the fishing industry;[1261] certain agricultural employees;[1262] employees of small circulation newspapers;[1263]

[1260] 29 U.S.C. § 213(a)(3) (1970). This section provides an exclusion if the establishment does not operate more than 7 months per year, or if during the preceding calendar year its receipts for any 6 months of such year were not more than 33 1/3 per centum of its average receipts for the other 6 months of such year.

[1261] 29 U.S.C. § 213(a)(5) (1970). Excluded are persons employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shell fish, crustacea, sponges, seaweeds, etc. or in the first processing, at sea of such aquatic forms of animal and/or vegetable life.

[1262] 29 U.S.C. § 213(a)(6) (1970). Under this section the exclusion applies under the following conditions:

> ...any employee employed by an employer who did not, during any calendar quarter during the preceding calendar year use more than five hundred man-days of agricultural labor, ...if such employee is the parent, spouse, child or other member of the employer's immediate family,...if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is employed and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year,...if such employee...(i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis...in the region of employment, (ii) is employed on the same farm as his parent..., and (iii) is paid at the same piece rate as employees over age sixteen... or if such employee is principally engaged in the range production of livestock....

[1263] 29 U.S.C. § 213(a)(8) (1970). Such newspapers must have a circulation of less than 4,000, the major part being within the county where published or surrounding counties.

independently owned telephone companies;[1264] sailors employed by foreign ship lines;[1265] or certain types of domestic employees.[1266]

In 1972 and again in 1974, the coverage of the EPA was expanded to include most employees previously excluded under the Act as adopted in 1963. That statute had exempted many State and local employees as well as professional, technical, administrative, and academic employees from equal pay guarantees.[1267] Title IX of the Education Amendments of 1972[1268] amended the EPA portions of the FLSA to include those professional, technical, administrative, and academic employees who were previously exempt.[1269] The FLSA amendments of 1974 extended EPA coverage to all State and local government employees.[1270]

[1264] 29 U.S.C. § 213(a)(10)(1970). Such companies must not have more than 750 stations.

[1265] 29 U.S.C.A. § 213(a)(12)(1974).

[1266] 29 U.S.C.A. § 213(a)(15)(1974). The exemption applies only to those domestic employees who are employed as babysitters or as companions of persons who are unable to care for themselves.

[1267] The Fair Labor Standards Amendments of 1966 provided protection to some State school and hospital employees.

[1268] The Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1972).

[1269] Persons employed in these positions, although covered by the EPA, are exempt from the minimum wage and overtime requirements of the FLSA.

[1270] 29 U.S.C.A. § 203(x) (1974). Administration of the EPA with respect to Federal employees is the responsibility of the U.S. Civil Service Commission. See Chapter 1 supra for a discussion of the Civil Service Commission.

Despite the fact that the Act extends to large segments of the work force, there are limitations on its applicability to specific work situations. It is significant that DOL has no jurisdiction under the EPA to find a violation before a person is actually employed.[1271] Although not a violation of the EPA, discriminatory pre-employment practices are a violation of Title VII of the Civil Rights Act of 1964,[1272] and DOL refers persons with such complaints to the Equal Employment Opportunity Commission.[1273]

The EPA expressly forbids wage discrimination[1274] between employees on the basis of sex when male and female employees perform or have performed equal work on jobs within the same establishement requiring "equal skill, effort, and responsibility, and which are performed under similar working conditions."[1275] DOL has defined these three criteria in its interpretations such that equal does not mean identical.[1276]

[1271] 29 U.S.C. § 203(j) (1974). A job applicant who notes a pay differential based solely on sex in the job she or he applies for would have no complaint under the EPA unless she or he accepted that position. In the very same situation the job applicant would have an actionable complaint under Title VII of the Civil Rights Act of 1964 even if she or he refused to be employed under such discriminatory conditions.

[1272] 42 U.S.C. § 2000e (1970).

[1273] Betty Southard-Murphy interview, supra note 1243.

[1274] Wages are interpreted to encompass "all payments made to or on behalf of the employee as renumeration for employment," including fringe benefits. 29 C.F.R. § 800.110 (1974).

[1275] 29 U.S.C. § 206(d)(1) (1970).

The criterion of "equal skill," for example, has been specified to include such factors as experience, education, training, and ability.[1277] The test of "equal effort," as defined by DOL, includes "the measurement of the physical or mental exertion needed for the performance of a job."[1278] Finally, the criterion of "equal responsibility" has been interpreted as "the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation."[1279] Generally, all three of these criteria must be met before a violation can be found. Thus, in the case of two similar jobs, if the higher paid position requires equal skill and effort but substantially more responsibility is required, DOL will find that there is no violation of EPA. Similarly, if the higher paid position requires substantially more skill than the other position, DOL will also find that there is also no EPA violation.

1276. 29 C.F.R. § 800.119 (1974).

1277. 29 C.F.R. § 800.125 (1974). Skill applies to the performance requirements of the positions under consideration, and not with the skills which employees may have but which are not necessary to perform the job.

1278. 29 C.F.R. § 800.127 (1974). Two employees performing substantially similar tasks may be found to perform jobs requiring equal effort although one may be required to put forth extra effort on an infrequent basis. For example, men and women working in a bottle factory may be found to be doing essentially equal work although men occasionally carry boxes.

1279. 29 C.F.R. § 800.130 (1974). A minor or insignificant difference in the degree of responsibility does not make the job unequal. For example, the equal responsibility standard generally would apply to women and men tellers in a bank even though there is a variation in the types of accounts handled by each employee.

The EPA specifically provides that there are circumstances under which unequal wages may be paid. Where it can be established that unequal wages were a direct result of a bona fide seniority system, merit system, a system measuring earnings by the quality or quantity of production, or any other factor other than sex, unequal wages may be paid.[1280] It is the employer who bears the burden of proof to show that the unequal wages were the result of one of these factors.

To enforce the EPA, the Act gives DOL three broad powers. The Secretary of Labor and his or her designated representatives are empowered to investigate possible violations of the law,[1281] conciliate or negotiate a settlement where violations are found,[1282] and litigate those instances where efforts to secure compliance have failed.[1283]

The most basic power is that of investigation. DOL may examine and take copies of documents such as payrolls, records of employment, personnel evaluations, and any other employee records that may have a bearing on an investigation.[1284] If necessary, such records may be subpoenaed.[1285] In addition, DOL may interview any and all employees.

[1280] See p. 437 *infra* in this report for a further discussion of DOL policy concerning these exceptions to coverage of the Act.

[1281] 29 U.S.C. § 211 (1970).

[1282] *Id.*

[1283] *Id.*

If a violation is found, voluntary compliance will be requested. In cases where voluntary compliance cannot be achieved, the Secretary may file two types of civil suits to collect back wages. Under Section 216(c) of the FLSA,[1286] the Secretary may file suit to collect back wages and an additional amount, equal to the back wages found due, as "liquidated damages"--in effect, double damages.

Earlier versions of Section 216(c)[1287] placed time consuming requirements in the way of the Secretary's use of the section and its liquidated damages entitlement.[1288] The 1974 FLSA amendments removed all of these impediments to the Secretary's effective use of the Section 216(c) suit.[1289]

1284. McComb v. Hunsaker Trucking Contractor, 171 F.2d 523 (5th Cir. 1948).

1285. Fleming v. Cudahy Packing Co., 41 F. Supp. 910 (C.D. Cal. 1941).

1286. 29 U.S.C.A. § 216(c) (1974).

1287. 29 U.S.C. § 216(c) (1963). This version of the statute required that the Secretary first obtain from the employee claiming unpaid back wages a written request for action on the employee's behalf. The statute also stated that action might be brought:

> ...Provided, that this authority to sue shall not be used...in any case involving an issue of law which has not been settled...and in any such case no court shall have jurisdiction....

1288. 29 U.S.C. § 216(b) (1970).

1289. 29 U.S.C.A. § 216(c) (1974).

Under Section 217 of the FLSA,[1290] the Secretary may bring an action in any Federal district court only seeking to collect back wages and prevent future violation of the Act. This section does not provide for the collection of liquidated damages and prior to the 1974 FLSA amendments, which liberalized the rules under which DOL could utilize Section 216 suits, Section 217 suits were the remedy generally used by DOL.[1291] The Section 216 suits, however, require a jury trial while Section 217 suits do not. This fact may encourage DOL to continue to use the Section 217 suit in order to save time and expedite litigation, reserving Section 216 remedy for the most flagrant violations.

Employees may file under Section 216(b).[1292] They may sue without providing notice to the Secretary, exhausting DOL administrative remedies, or even filing a complaint. Employee suits may be filed, at any time, to recover unpaid back wages and liquidated damages. The employee's right to sue, however, is terminated after the Secretary files suit.[1293]

[1290] 29 U.S.C. § 217 (1970).

[1291] The Secretary is not required under section 216 or 217 to give notice to employees or those who file complaints under the EPA of an intent to sue.

[1292] 29 U.S.C. § 216(b) (1970).

[1293] 29 U.S.C.A. § 216(c) (1974).

In the case of employee suits, other employees may be cited as parties to the actions only after their written consent has been obtained.[1294]

The statute of limitations for these litigative remedies is two years.[1295] Thus, back wages are usually recoverable for only two years. However, if the violation is found to be a willful one, the statute is extended by one year. Courts have defined the action of an employer to be "willful" when:

> ...there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture? 1296

Title VII of the Civil Rights Act of 1964[1297] is closely related to the EPA, but also covers employment discrimination based on race, religion, national origin, or color. Further, Title VII is more far reaching and comprehensive in its prohibition of all aspects of employment discrimination. For example, it makes it unlawful for employers to fail or refuse to hire any person because of sex.[1298] It also covers promotion practices, prohibits the use of sex as an occupational qualification, and other

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1294. 29 U.S.C. § 216(b) (1970).

1295. The Portal to Portal Act of 1947, 29 U.S.C. §§ 251-261 et seq. (1974).

1296. Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir. 1971).

1297. 42 U.S.C. § 2000e (1970).

1298. 29 C.F.R. § 1604 (1974).

similar actions not proscribed under the EPA.[1299] Finally, the EPA only requires the restoration of back wages, while under Title VII an employer may be required to take actions to correct the effects of past discrimination, e.g., revising seniority systems or establishing goals and timetables for the hiring and promoting of employees previously discriminated against.[1300]

VII. Organization and Staffing

A. Washington Office

The Employment Standards Administration (ESA), headed by an Assistant Secretary, is responsible for the administrative enforcement of the EPA, as well as for programs dealing with nondiscrimination by Federal contractors and subcontractors; worker's compensation: minimum wages and overtime standards; age discrimination; and the promotion of women's welfare. The Assistant Secretary has no direct role in EPA enforcement.[1301] His or her primary functions are to coordinate the activities of the divisions under his or her supervision and to provide broad policy guidance.

[1299] *Id.*

[1300] *Id.*

ESA has a decentralized structure, consisting of a headquarters office in Washington, which sets policy and makes general administrative decisions, and 10 regional offices,[1302] where enforcement activities take place. ESA headquarters is composed of the Wage and Hour Division, which has primary responsibility for Equal Pay Act enforcement; the Office of Federal Contract Compliance; the Women's Bureau; the Office of Workmen's Compensation Programs; the Office of Federal Employees Compensation, and the Office of Administrative Management.[1303]

The Wage and Hour Division, under the direction of the Wage and Hour Administrator, is responsible for setting policies and procedures for the enforcement of the FLSA and predetermining wage rates for Federal

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1301. Although the Assistant Secretary is the only Washington official with line authority over field staff, he or she is not involved with the day-to-day enforcement decisions. It is the Assistant Secretary, however, who allocates resources for the various enforcement programs, including EPA.

1302. See map on p. 429 infra.

1303. See chart on p. 428 infra.

contracts.[1304] The Administrator's staff consists of the immediate office with a Deputy Wage and Hour Administrator and support staff: the Office of Fair Labor Standards under an Assistant Administrator and an Office of Government Contract Standards, also under an Assistant Administrator.[1305] Although the Administrator is responsible for the oversight of the enforcement of a number of provisions of the FLSA, she or he spends a considerable amount of her or his time on equal pay matters.[1306]

The two major subdivisions of the Wage and Hour Division are the Office of Government Contract Wage Standards[1307] and the Office of Fair Labor Standards. The divisions of the Office of Fair Labor Standards have first line responsibility for providing policy guidance and assistance to the field offices in the enforcement of the FLSA. The Division of Equal Pay and Employment Standards performs this function with respect to the enforcement of the EPA.[1308] The assistance is usually provided in response to inquiries from field enforcement staff.[1309] The Division has a total professional staff of 12, five of whom devote 100 percent of their time to EPA matters.

[1304] See Chart on p. 430 supra.

[1305] Letter from John T. Dunlop, Secretary of Labor, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Apr. 24, 1975, Appendix II. The total staff of the national office of the Wage-Hour Division is 154 positions. Id.

[1306] Southard-Murphy interview, supra note 1243.

[1307] The mission of the Office of Government Contract Wage Standards is similar to that of the Office of Fair Labor Standards except that its principal functions center around monitoring the enforcement of statutes providing for the predetermination of wage rates on construction alteration and repair contracts under Federal aid programs. It also directs a continuing program for determining prevailing minimum wages and fringe benefits under the Service Contract Act.

[1308] Policy guidance may be in the form of opinions, regulations, and handbooks.

[1309] Interview with Francis McGowan, Chief, Division of Equal Pay and Employment Standards, DOL, Oct. 23, 1974.

Lawsuits filed by DOL to enforce the FLSA are prosecuted by the Office of the Solicitor. The Solicitor reports directly to the Under Secretary of Labor and is not accountable to the Assistant Secretary for Employment Standards or the Wage and Hour Administrator Equal pay cases are handled by the Associate Solicitor for Fair Labor Standards, who has a headquarters staff of 24 attorneys for FLSA enforcement.

B. Field Offices

DOL regional offices are located in the 10 standard Federal regions.[1310] Each regional office oversees the activities of several area offices[1311] where actual EPA enforcement work takes place. The organization of regional offices is similar to that of DOL headquarters.[1312] Under DOL organization, the regional director is head of the office; however, the regional director is only the Secretary's personal representative in each of the 10 Federal regions. As such he or she is responsible for little more than articulation of the Secretary's policy, dealing with State and local officials, representing DOL on Federal regional councils, and insuring coordination among programs. As such, the regional director does not have responsibility for either program

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1310. See map on p. 429 infra.

1311. See chart on p. 428 infra. As of January 1975, there were 87 Wage and Hour area offices.

1312. See organization chart on p. 430 infra.

direction or supervision of field personnel.[1313] All programs administered by ESA in the field are under the direct control of the Assistant Regional Director for Employment Standards (ARD/ESA) in each region. The ARD/ESA reports directly to the Assistant Secretary. Reporting to the ARD/ESA is an Associate Assistant Regional Director for Wage-Hour (AARD/WH).[1314] The Assistant Regional Director for ESA supervises activities of the Associate Assistant Regional Director for Wage and Hour, to whom the area office directors report.[1315]

Area offices are the smallest subdivisions of DOL and are staffed with area office directors who supervise a number of compliance officers and an administrative staff[1316] The compliance officers (CO) conduct the

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1313. Dunlop letter, supra note 1305.

1314. Id. DOL recently informed this Commission that:

> Parenthetically, much of the confusion surrounding the understanding of the chain of command in each region results from the nomenclature used to title the various positions of responsibility. A number of changes in titles are under study by the Department to clarify public understanding of these relationships. Id.

1315. The Assistant Regional Director for ESA also supervises AARD's for Contract Compliance and the Women's Bureau.

1316. McGowan interview, supra note 1309. Several agencies in DOL have local organizational units called area offices including ESA and the Occupational Safety and Health Administration. In ESA's case, the area office units exist only to administer the Wage-Hour programs. A typical area office is headed by an Area Director at the GS-14 level, and in most instances is supported by an Assistant Area Director at the GS-13 level (a senior compliance officer who spends half of his time in supervisory activities). An average of 12 compliance officers is assigned to a given area office. One or two clerical personnel in each office provide supporting services. Dunlop letter, supra note 1305.

equal pay investigations. The number of compliance officers varies with the workload in a given locality. Some COs are located in area office field stations. Many field stations consist of one compliance officer housed at the local post office.[1317]

As of September 30, 1974, there was a total of 979 compliance officers in Wage and Hour area offices. Most compliance officers (663) were at the journeyperson GS-12 level.[1318] Of the remainder, 77 were at the GS-13 level, 55 were GS-11's, 26 were GS-9's, 45 were GS-7's, and 113 were at the GS-5 level. The GS-11 and 12 compliance officers conduct investigations on their own, while those at the lower levels generally are assigned cases of a lower level of difficulty or cases in which they are provided assistance.[1319]

Wage and Hour compliance officers devoted approximately 10 percent of their time or 89.3 person years to EPA enforcement in fiscal year 1974. The remainder of this time was spent on enforcement of the minimum wage, overtime, and child labor provisions of the FLSA, the Age Discrimination in Employment Act, and other legislation related to labor standards for government contracts, crew leaders furnishing contract farm labor, and extensions of these laws.[1320]

[1317] McGowan interview, supra note 1309.

[1318] As a rule, Wage and Hour compliance officers are hired only at the GS-5 and 7 entry levels and work their way up to the higher levels.

[1319] McGowan interview, supra note 1308, and Dunlop letter, supra note 1305.

Despite the fact that the EPA workload has steadily increased, the number of compliance officers has remained fairly constant.[1321] In fiscal year 1969, for example, there were 987 Wage and Hour compliance officers on duty, eight more than in fiscal year 1974. Yet, in the former year, only 385 complaints alleging EPA violations were received, as opposed to 2,864 in fiscal year 1974.[1322] In fact, the Wage and Hour Administrator has recently pressed unsuccessfully for the addition of one GS-13 EPA specialist to each area office.[1323]

[1320] Dunlop letter, supra note 1305. Through the first half of fiscal year 1975, 57 person years of compliance officer time was available for Equal Pay enforcement. This represented 12 percent of the total enforcement effort. Id.

[1321] DOL recently wrote to this Commission that ESA currently has sufficient resources to investigate all complaints of alleged EPA violations and to maintain a significant program of GSA initiated selective enforcement actions under the Act. Dunlop letter, supra note 1305.

1322. DOL recently informed this Commission that:

> As enforcement workloads under the EPA have increased, ESA has requested and been granted increases in compliance officer staff for the sole purpose of meeting these workloads. In FY 1974 and FY 1975, ESA's budget requests have resulted in the addition of 48 compliance officer positions bringing the current budgeted positions to 148 for EPA enforcement. During Fiscal Years 1972 and 1973, ESA maintained the level of strength devoted to such enforcement in the face of an overall decline in compliance officer resources. Dunlop letter, supra note 1305.

1323. Southard-Murphy interview, supra note 1242. However, DOL now asserts that:

> ESA has filed a request with the Civil Service to establish 80 compliance specialist positions at the GS-13 level for Equal Pay and ADEA enforcement. That request is still pending CSC approval. These positions would be created within existing compliance officer authorizations and does not constitute an addition to authorized positions. Dunlop letter, supra note 1305.

Each regional office also contains a regional solicitor's office which is responsible for prosecuting court actions where Wage and Hour field staff are unable to secure voluntary compliance. Major cases against national employers, however, are referred to the headquarters Office of the Solicitor for action. Regional solicitor's offices allocate approximately 25 percent of staff time to EPA enforcement, with one attorney generally given the responsibility for handling all EPA cases in a given region.[1324]

Although the responsibility for setting policy and developing procedures for EPA enforcement rests with the Wage and Hour Administrator, field enforcement staff are not accountable to her or him. The ARD/ESA is the top regional official relating to EPA matters and he or she reports to and is directly accountable to the Assistant Secretary for ESA.[1325]

[1324] Interview with Carin Clauss, Associate Solicitor for Fair Labor Standards, DOL, Feb. 20, 1975.

[1325] Dunlop letter, supra note 1305. DOL had indicated that the decentralization of program responsibility has long been a part of ESA's management methodology and that day-to-day operational management of ESA programs, including the decision on local needs and priorities is optimally made at the regional and local level. Id.

Prior to 1972, the Wage and Hour Administrator had direct control over field enforcement of the EPA.

One result of the reorganization has been that there is no formal mechanism for national coordination of EPA enforcement. There have been instances, for example, where compliance officers have conducted investigations of installations of employers in their regions without the knowledge that other installations of the same employer were being or had been investigated in other regions.[1326] Clearly, preventing these lapses of coordination should be the function of the Wage and Hour Division. Without authority over the field staff, however, the Wage and Hour Administrator is unable to do this in an assertive manner.[1327]

Similarly, the Administrator is unable to effectively establish enforcement priorities and allocate field resources accordingly. For example, although the former Administrator adopted a policy setting EPA enforcement as the top priority for FLSA,[1328] regional offices allocated only 11 percent of their compliance resources to EPA enforcement. In practice, it is the Assistant Regional Directors for ESA who set priorities and allocate resources for Wage and Hour enforcement activities in the field.[1329] Although regional directors have no program or accountability functions, they participate with the Assistant Secretary for ESA in performance evaluations of regional ESA staff, thus making these persons partially accountable to them.[1330]

[1326] Interview with John A. Cravin, Associate Assistant Regional Director, (ESA), DOL, Region III, Oct. 31, 1974.

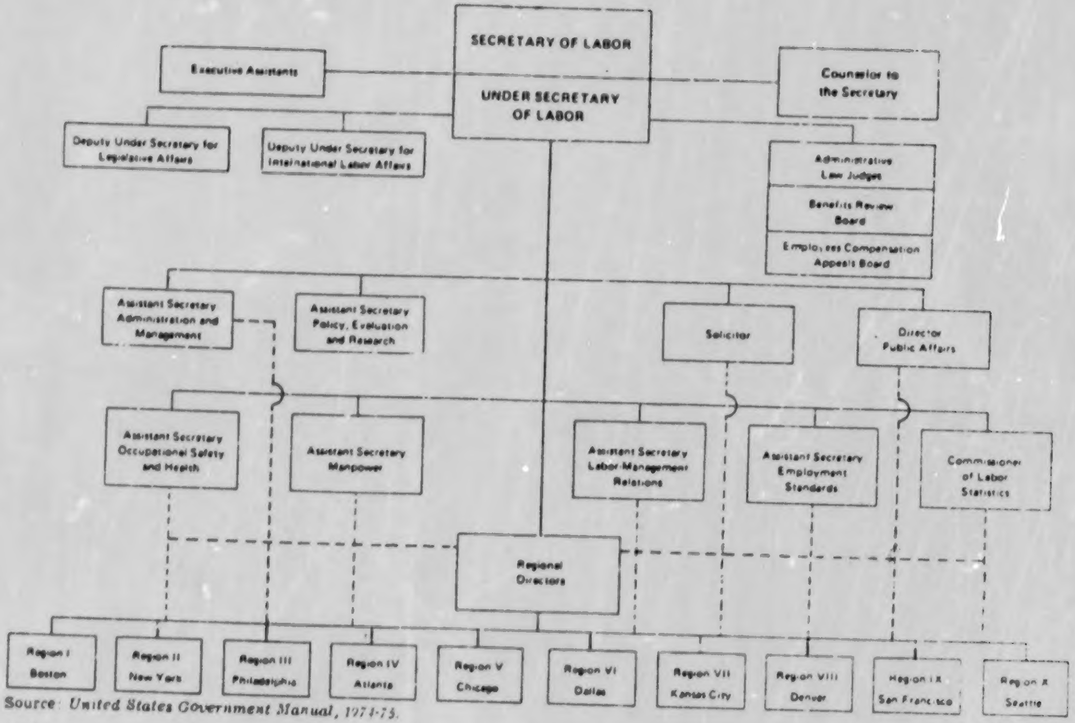
[1327] According to DOL, any breakdown in communication between Wage and Hour's national office and regional operations is due to oversight and not structural defects. Dunlop letter, supra note 1305.

[1328] Southard-Murphy interview, supra note 1243.

[1329] Cravin interview, supra note 1326.

[1330] The Assistant Secretary for Employment Standards has indicated that he is consulted by regional directors in the conduct of performance evaluations of assistant regional directors, but that it is the regional directors who have the final authority. DeLury interview, supra note 1249.

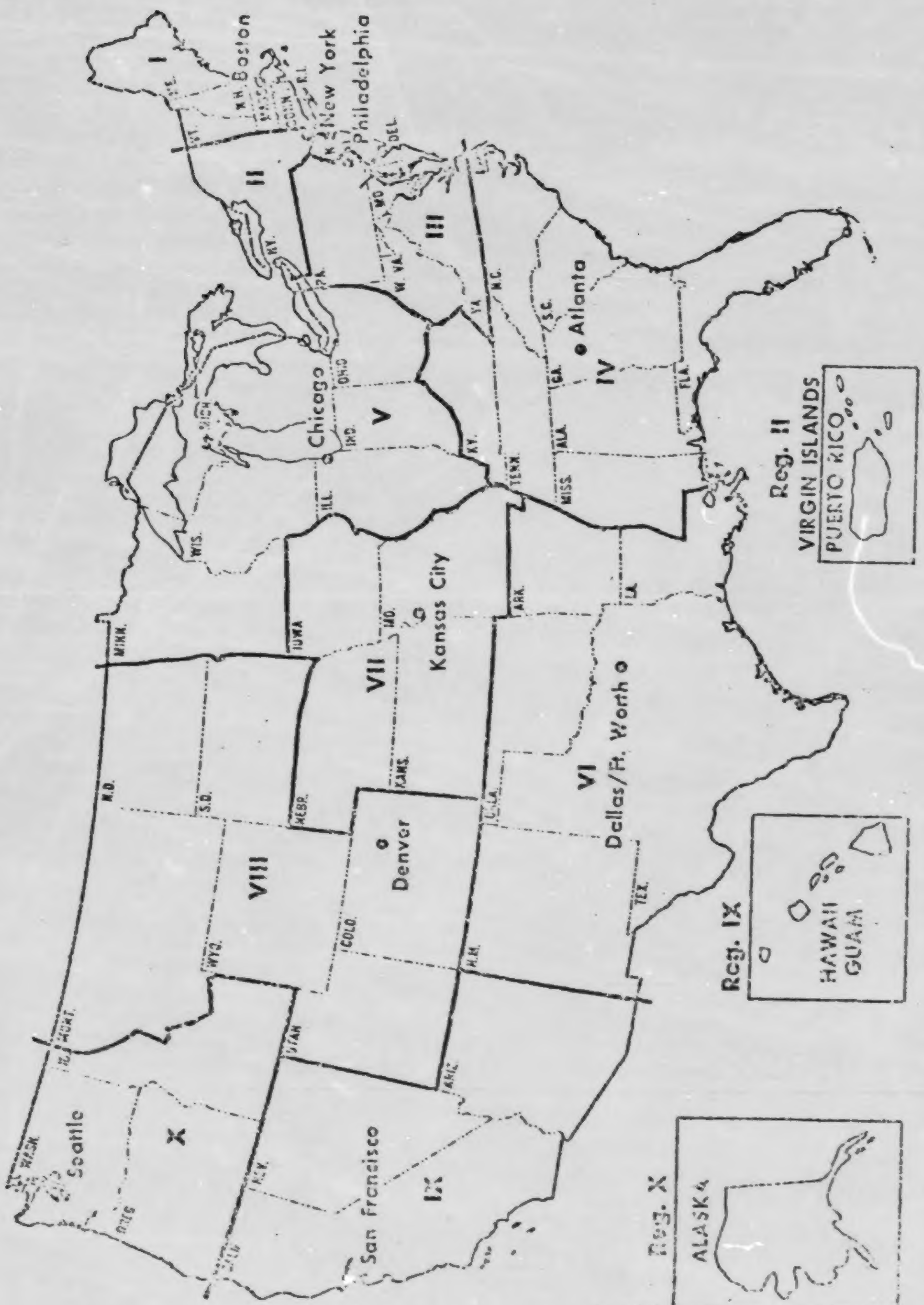
DEPARTMENT OF LABOR


SECRETARY OF LABOR
UNDER SECRETARY OF LABOR
Executive Assistants
Counselor to the Secretary
Deputy Under Secretary for Legislative Affairs
Deputy Under Secretary for International Labor Affairs
Administrative Law Judges
Benefits Review Board
Employees Compensation Appeals Board
Assistant Secretary Administration and Management
Assistant Secretary Policy, Evaluation and Research
Solicitor
Director Public Affairs
Assistant Secretary Occupational Safety and Health
Assistant Secretary Manpower
Assistant Secretary Labor-Management Relations
Assistant Secretary Employment Standards
Commissioner of Labor Statistics
Regional Directors
Region I Boston
Region II New York
Region III Philadelphia
Region IV Atlanta
Region V Chicago
Region VI Dallas
Region VII Kansas City
Region VIII Denver
Region IX San Francisco
Region X Seattle

Source: *United States Government Manual, 1974-75.*

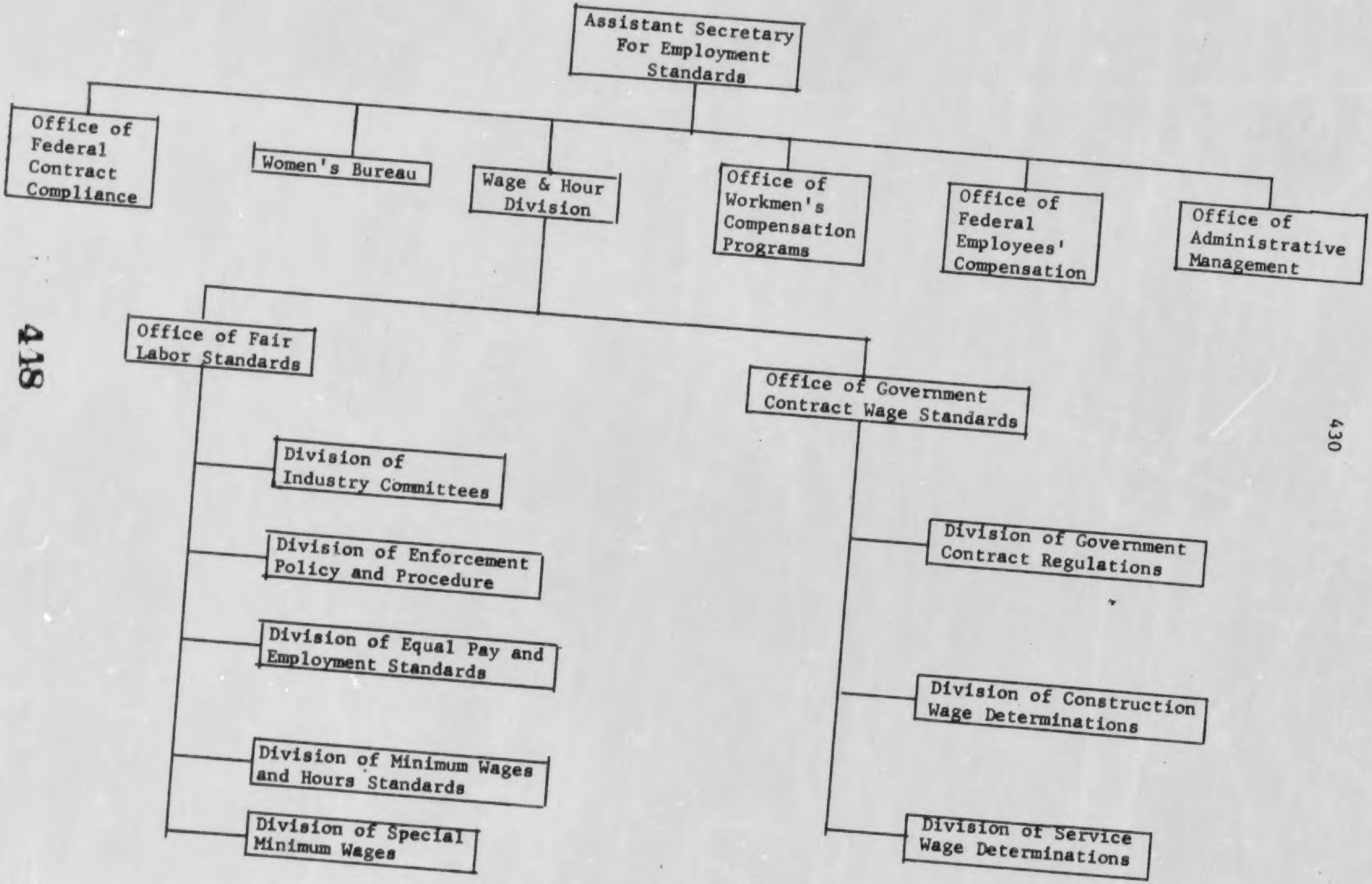
DEPARTMENT OF LABOR

Regional Boundaries


I
Boston
II
New York
Philadelphia
III
IV
Atlanta
V
Chicago
VI
Dallas/Ft. Worth
VII
Kansas City
VIII
Denver
IX
San Francisco
X
Seattle
ME.
VT.
N.H.
MASS.
CONN.
R.I.
N.Y.
N.J.
PA.
DEL.
MD.
W. VA.
VA.
N.C.
S.C.
GA.
FLA.
ALA.
MISS.
TENN.
KY.
OHIO
IND.
ILL.
MICH.
WIS.
MINN.
IOWA
MO.
ARK.
LA.
KANS.
NEBR.
S.D.
N.D.
OKLA.
TEX.
N.M.
COLO.
WYO.
MONT.
UTAH
ARIZ.
NEV.
CALIF.
IDAHO
ORE.
WASH.
Reg. II
VIRGIN ISLANDS
PUERTO RICO
Reg. IX
HAWAII
GUAM
Reg. X
ALASKA

DOL Organizational Structure

(As it Applies to Equal Pay Matters)


Assistant Secretary For Employment Standards
Office of Federal Contract Compliance
Women's Bureau
Wage & Hour Division
Office of Workmen's Compensation Programs
Office of Federal Employees' Compensation
Office of Administrative Management
Office of Fair Labor Standards
Office of Government Contract Wage Standards
Division of Industry Committees
Division of Enforcement Policy and Procedure
Division of Equal Pay and Employment Standards
Division of Minimum Wages and Hours Standards
Division of Special Minimum Wages
Division of Government Contract Regulations
Division of Construction Wage Determinations
Division of Service Wage Determinations

IV. Policy

DOL's equal pay enforcement policies are found in the Code of Federal Regulations (CFR). The CFR section explaining these policies is entitled the "Interpretative Bulletin" (IB)[1331] and is the principal source document explaining how DOL will enforce the FLSA.[1332] Although the FLSA does not require the Secretary to issue regulations, such power is inherent in enforcement responsibility. Ruling in a case of sex discrimination, a Federal court explained that decisions and interpretations of enforcement agencies were entitled to great weight and deference.[1333] The fact that courts assign importance to agency interpretations, that employers frequently comply with DOL's policies,[1334] and that employees decide whether to complain based on DOL policy issuances makes the IB a document of significance, equivalent to regulations.

To further ensure uniformity of enforcement, DOL developed a Field Operations Handbook (FOH) for its compliance officers.[1335] Since parts of the FOH are in the public domain,[1336] it too furnishes some insight

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1331. 29 C.F.R. §§ 800.00-800.166 *et seq.* (1974).

1332. Only 25 pages of the 686 page Code of Federal Regulations setting forth DOL, Wage and Hour interpretation cover EPA enforcement.

1333. Gilbert v. General Electric Company, 375 F. Supp. 367 (E.D. Va. 1974). The court based its conclusion of law on precedent from Griggs v. Duke Power Co., 401 U.S. 424 (1971).

1334. McGowan interview, *supra* note 1309.

1335. U.S. Department of Labor, Employment Standards Administration, *Field Operations Handbook* (1974).

1336. DOL, ESA, FOH, *supra* note 1335, Chapter 34, "FLSA Section 6(d)-Equal Pay." The only pertinent section in the public domain in Chapter 34.

into DOL's approach to practical policy questions. Its main function, however, is as a guide for DOL personnel.

Publication and maintenance of these two documents is the responsibility of the Assistant Secretary for Employment Standards who has redelegated the function to the Wage and Hour Administrator.[1337] The IB and the FOH also are used by the Administrator as management vehicles through which control is exercised over the compliance process.[1338] Thus, these documents play an important role in the enforcement process.

Nevertheless, the IB and the FOH are not adequate enforcement tools. For example, both publications contain key issues in which policies of DOL and the Equal Employment Opportunity Commission are inconsistent and which may even encourage the type of unequal treatment of women the EPA was intended to eradicate.

The first major policy issue concerns pensions. The purpose of a pension plan is to provide income to workers after they have retired. The entitlement to the pension flows directly from the fact that the individual has worked, earned a certain income, and has been employed over a certain period of time. These factors are used as basis for calculating pension benefits. According to the IB, all payments made by an employer to or on behalf of an employee are considered to be wages under the FLSA.[1339] Wages under FLSA must be equal for equal work, but in the area of pensions DOL appears to have ruled that pension plan benefits do not always have to be equal in every respect. In the IB and in a 1970 legal opinion, DOL has specified that the requirements of the FLSA are satisfied either if an employer's contributions to a pension plan are equal or if the benefits are equal.[1340] In other words, if an employer makes equal contributions to a pension plan, it makes no difference if the end result is sex discrimination through the payment of unequal benefits.

[1337] Ultimate responsibility for all DOL equal pay activities is vested in the Secretary of Labor. 29 U.S.C. § 204(a) (1970).

[1338] Southard-Murphy interview, supra note 1242.

DOL's test of "equality" concerning pension plans under FLSA is not consistent with EEOC pension plan guidelines. According to EEOC guidelines, all employees must receive the same benefits[1341] and the fact that a plan pays men and women different rates would be a prima facie case of sex discrimination. In general, EEOC holds that the, "principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."[1342]

1339. 29 C.F.R. § 800.110 (1974).

1340. 29 C.F.R. § 800.116(d) (1974); DOL, Wage and Hour Opinion Letter (WH-70), Aug. 25, 1970. In 1974, this Commission urged that the Department of Labor reverse this policy as it is applied by the Department's Office of Federal Contract Compliance. Letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Bernard DeLury, Assistant Secretary for Employment Standards, Department of Labor, Sept. 18, 1974.

1341. 29 C.F.R. § 1604.9(f) (1974).

1342 29 C.F.R. § 1604.2(a)(1)(ii) (1974).

The second major policy issue concerns maternity benefits. According to DOL, such benefits are not wages within the definition of the Act.[1343] The fact that DOL considers that there are non-sex-related fringe benefits such as retirement income benefits protected by the FLSA,[1344] but excludes a sex-related fringe benefit, the entitlement to which for employees accrues by virtue of the fact of employment,[1345] makes such a policy suspect. Moreover, EEOC's sex discrimination guidelines generally require that there be no discrimination between men and women with regard to fringe benefits,[1346] and specifically prohibit the practice that DOL condones.[1347]

1343. DOL, Wage and Hour Opinion Letter (419), Jan. 7, 1966. In a 1966 opinion, DOL stated:

> ...that payments related to maternity which are made by an emplcyer to an employee do not constitute remuneration for employment and are...beyond the scope of the equal pay provisions.

1344. 29 C.F.R. §§ 800.110, 800.113, 800.116 (1974); FOH 34604 (1965).

1345. DOL, Wage and Hour Opinion Letter (419), _supra_ note 1318.

1346. 29 U.S.C. § 1604.9 (1974).

1347. _Id_.

The third major policy issue concerns employee training. In a discussion of employee training programs the IB states:

> Training programs which appear to be available only to employees of one sex will, however, be carefully examined to determine whether such programs are, in fact, bona fide.[1348]

The guidance provided employers in the IB is that men may receive training from which women are excluded by virtue of their sex or vice versa. It would appear that this policy would be justified only in situations where the training was for a position for which sex was a bona fide occupational qualification or in a program where an effort was being made to overcome the effects of past discrimination. It is likely, however, that employers will interpret this provision more broadly and use it as justification for discriminatory training programs.[1349]

The conservative approach adopted by DOL on these three issues is not the only problem in the IB. There are also deficiencies of another sort.

1348. 29 C.F.R. § 800.148 (1974).

1349. EEOC prohibits sex discrimination in training programs. 29 C.F.R. § 1604.2 (1974). In fact, DOL has pervailed in cases attacking discriminatory training programs. The findings of these cases show that DOL's actual policy differs from its published guidelines on this question. See Hodgson v. Behrens Drug Company, 475 F.2d 1041 (5th Cir. 1973), cert. denied sub nom. Behrens Drug Company v. Hodgson, 414 U.S. 822 (1973); and Schultz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969).

The IB has not adequately been updated to keep current with recent amendments to the FLSA. For example, after almost three years no changes have been made to the IB explaining how it applies in cases arising under the Education Amendments of 1972,[1350] which placed administrative, technical, and professional employees--including teachers--under EPA coverage. Although the amendments merely removed an exemption, making all of the provisions of the IB applicable to the new categories, there are some unique and complex questions relating to the use of the standards of equal skill, effort, and responsibility in these new areas. For example, DOL could have addressed the question whether an institution of higher education can claim that education professionals with degrees from prestigious private universities are more skilled members of the faculty than those education professionals with degrees from public institutions, thus justifying higher salaries for the former than for the latter.[1351]

Failure to publish uniform, clear, and specific instructions may have effectively prevented employers from complying with the law. In addition, female professionals may have been denied the hope of reaching out-of-court settlements with employers because of the vagueness of the guidelines.

1350. The Education Amendments of 1972, 20 U.S.C.A. §§ 1681-1686 (1974).

1351. Southard-Murphy interview, supra note 1242. The Administrator reports that a substantial number of lawsuits against higher educational institutions--one category included under FLSA amendments of 1972--will be filed in 1975 for violations of the EPA since 1972.

The FLSA provides that unequal pay may be permissible in cases of merit or seniority systems.[1352] Nowhere in the IB is there any explanation of the essential elements of a merit or seniority system. Although the IB states that thorough examination will be made by DOL personnel of any exemptions to EPA coverage, and it is possible to petition the Administrator for an opinion with regard to coverage, no uniform principles have been published.[1353] Employers with merit or seniority systems appear not to have received the direction they require to comply with the EPA.[1354]

1352. 29 U.S.C. § 206(d)(1) (1970).

1353. Telephone interview with Frank McGowan, Chief, Division of Equal Pay and Employment Standards, Wage and Hour Division, ESA, DOL, Feb. 10, 1975. DOL examines such systems on their individual merits. Justification provided by the employer is carefully studied to determine sufficiency. Id. In an important recent case a seniority system was found to have had a major effect on the payment of unequal wages which the court ordered paid back to female employees. Hodgson v. Corning Glass Works, 474 F.2d 226 (2d Cir. 1973), aff'd sub nom. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

1354. Although DOL provides no direct clarification of its policy on merit and seniority systems in the IB, the following sections of the IB do explain some aspects of this question: 29 C.F.R. §§ 800.142 800.146 (1974). Here the IB provides some general observations concerning the excepted wage differentials; establishing the absence of sex as a factor in determining unequal wages; a one paragraph summary of excepted systems, seniority, merit, or i.e., quality/quantity measures; and two examples. An employer may be able to discern what will be acceptable by a careful reading of these IB sections as well as obtaining an opinion from the Administrator. However, the section explaining excepted systems (29 C.F.R. § 800.14 (1974)) simply states that they must be a bona fide and that the employer bears the burden of proving the exemption is not based on sex.

The FOH, a procedural manual covering FLSA matters, has one chapter dealing specifically with EPA policy.[1355] Since it is keyed to the IB, the chapter suffers from the same three basic problems of the IB; it adopts a conservative approach on some important issues, it has not been adequately updated, and it contains no discussion of seniority systems.

A matter of great concern to women on which the FOH takes a restrictive point of view is the subject of part-time workers. The FOH permits part-time workers, the majority of whom are female,[1356] to be paid lower wages than full-time workers, and it does not state whether part-time employees must receive fringe benefits. The FOH position allowing employers to set lower retirement ages for employees based on sex also appears to be an unduly narrow interpretation of the EPA.[1357]

[1355] DOL, FOH, ch. 34, "FLSA Section 6 (d) - Equal Pay," supra note 1335.

[1356] By 1970 there were 8,783,090 women were part-time employees, compared with 7,015,021 part-time employees who were men. Women are heavily concentrated in retail sales and clerical occupations. U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of the Census, 1970 Census of Population: United States Summary, Table 215, 221 (1970).

[1357] DOL, FOH, ch. 34§ bo4(b)(2) (1966). This section provides that employers may select different retirement ages for men and women without violating the EPA. The section makes no observation of the fact that this practice is in violation of Title VII of the Civil Rights Act of 1964.

The FOH is silent on other key issues, such as unequal pay that can result from unequal training opportunities or the denial of training.

The chapter also needs some revision to show the impact of the 1972 and 1974 Amendments. For example, it contains a case study section which provides a discussion of the application of equal skill, effort, and responsibility criteria, but none of the instances presented deals with professionals added to the EPA as a result of the amendments.[1358]

[1358] DOL, FOH, ch. 34 § e. The categories of employment include: clerical, manufacturing, or factory jobs, janitorial services, nursing home orderlies, and nurse's aides.

V. Enforcement

A. Administrative Enforcement

The EPA enforcement process is triggered by the filing of a complaint by an aggrieved employee or, less often, by a self-initiated DOL investigation. A complaint may be filed by any person who believes herself or himself or any specific group of persons to be subjected to discrimination prohibited by the Act, or by any individual who believes that violations of the Act exist in any place of business.[1359] The complaint may be written or oral and may be made anonymously.[1360] Additionally, Wage and Hour compliance officers are required to investigate EPA violations encountered in the course of investigations initiated as a result of complaints alleging violations of other laws enforced by DOL.

Complaints alleging EPA violations are received and processed in area offices. Wage and Hour area offices received complaints against 2,864 establishments alleging violations of the EPA in fiscal year 1974.[1361] As a result of complaint investigations conducted in that year,[1362] 20,737 employees were found to be underpaid in the amount of $13,846,838.[1363]

[1359] 29 U.S.C. § 211(a) (1970).

[1360] Anonymous complaints are generally investigated and are handled as if they were DOL initiated investigations.

[1361] DOL, Office of Administrative Management, Division of Management Information and Computer Systems, "Equal Pay Act Findings: 1965-1974" (undated).

[1362] DOL does not maintain separate figures on the number of EPA investigations it undertakes. Although its data collection instrument provides figures on the number of reviews affecting each provision of the FLSA, DOL does not compute the figures separately; thus it could provide data only on the overall number of FLSA investigations undertaken. In fiscal year 1973, DOL staff conducted 75,206 FLSA investigations and in fiscal year 1974 the number decreased to 63,035. DOL, Office of Research and Management, "Investigations Made and Findings for Years Indicated: 1960-1974" (undated).

[1363] DOL, Wage and Hour Division, Division of Equal Pay and Employment Standards, "Complaint and Non-Complaint Statistics: 1967-1974" (undated).

In fiscal year 1973, complaints against 2,095 establishments[1364] were received and complaint investigations uncovered $10,509,377 in underpayments to 19,732 employees.[1365] In addition, as a result of DOL initiated investigations, 12,055 employees were found underpaid by $6,776,992 in fiscal year 1974 and 9,886 were found underpaid by $7,496,205 in fiscal year 1973.[1366]

At the end of fiscal year 1974, the Wage and Hour Division reported a backlog of 1,606 EPA complaints nationwide.[1367] Due to the large number of uninvestigated complaints, it is normal for an investigation not to be initiated until three months after the filing of a complaint.[1368]

The procedures for handling complaints and DOL self-initiated investigations are delineated in the Wage and Hour Division's Field Operations Handbook.[1369] The first step in this process is the pre-investigative evaluation. It is at this stage that a determination is made as to whether there is jurisdiction under the FLSA. If violations of other anti-discrimination laws are alleged, the complainant is directed to the appropriate Federal agency. Complaints are not referred to other agencies because to do so, DOL believes, would violate its policy of keeping the names of complainants confidential.[1370]

[1364] 1364. DOL, "Equal Pay Act Findings: 1965-1974" supra note 1361.

[1365] 1365. DOL, "Complaint and Non-Complaint Statistics: 1967-1974," supra note 1363.

[1366] 1366. In fiscal year 1974, a total of $6,841,443 was restored to 16,768 employees as a result of the DOL compliance program. In fiscal year 1973, the amount was $4,626,251 for 17,331 employees. Id. For a discussion of the amount of money recovered by DOL for employees as a result of litigation, see p. 456 infra.

[1367] 1367. DOL, ESA, Office of Administrative Management, Division of Management Information and Employment Standards, "Number of Complaints in Backlog on Dec. 20, 1974 and June 20, 1974, by Act and Region" (undated).

[1368] 1368. Interview with Jack R. Elliott, Area Director, Hyattsville Area Office, Region III, DOL, Oct. 7, 1974.

[1369] 1369. DOL, ESA, FOH, supra note 1335. DOL used to conduct another form of investigation known as a "spot check." This brief review of an employer's compliance with all FLSA standards, including the EPA, proved ineffective and it was abandoned several years ago. McGowan interview, supra note 1354.

It is the area director's responsibility to determine the order in which complaints are investigated. The Field Operations Handbook does not require that complaints be investigated in the order received but states that compliance staff should follow a "worst first" policy under which complaints having the greatest potential monetary benefit to employees or involving issues such as fraud or criminal action be investigated first.[1371] Other factors such as the past history of the employer, the probability of litigation, the seriousness of the alleged violation, staff resources available in the area, and other program responsibilities may also be considered in determining the priority of investigations.

In preparing for an assigned investigation, the compliance officer is required to review the case and become familiar with the basis of the assignment, i.e., if the case was initiated by an actual complaint or if the case is DOL initiated; review any relevant historical material pertaining to the case, e.g., if there have been previous violations registered against the same employer; and review all possible problem areas, such as the application of the EPA tests of skill, effort, and responsibility.[1372]

1370. McGowan interview, supra note 1309. For a further discussion of DOL's policy of confidentiality and its effects on interagency coordination, see p. 462 infra.

1371. DOL, ESA, FOH, supra note 1335, at ch. 51 § s01.

1372. DOL, ESA, FOH, supra note 1335, at ch. 52 § a01.

The FOH clearly requires that if violations of other laws are observed during the investigation, the CO must report the situation to his or her area director.[1373] Thus, it is also important that the CO be informed of the provisions of other laws which are applicable to the enterprise to be investigated.[1374]

The investigation begins with a discussion with the employer. The purpose of this initial interview is to inform the employer that the purpose of the investigation is to determine compliance with the FLSA or other laws that DOL enforces, to outline the general terms and scope of the investigation including procedures to be used, to provide the employer with DOL publications, and to discuss the employer's general approach to the law and compliance with it.[1375] One of the basic functions of the initial interview from the CO's perspective is to become acquainted with the methods used by the employer to set wages, particularly with respect to men and women in the same or closely related jobs.

The subsequent tour of the employer's establishment is the compliance officer's most effective technique for determining the similarity or dissimilarity of the job functions performed by men and women. By personally observing the performance of job functions, the compliance officer attempts to identify jobs held by men and women which appear to be substantially equal. This provides a basis for an examination of payroll and personnel records to check for pay differentials in these positions.

[1373] Id. at ch. 53 § g03 and WH Form 124-2. The area directors are charged with effecting coordination with other Federal agencies when they feel it is necessary.

[1374] COs have received training on the scope of other Federal sex discrimination laws. Mc Gowan interview, supra note 1308.

[1375] Id. at ch. 52 § a09.

The examination and transcription of payroll and personnel records is an important phase of the investigative process in terms of the documentation of EPA violations.[1376] Initial examination of payroll records, for example, may reveal situations where women with the same job titles as men receive less pay. The compliance officer transcribes from these records the names and sex of employees holding jobs in question, the date they were hired, their rate of pay, prior experience, and education. Assembling the data in this manner enables the compliance officer to determine whether pay differentials are due to factors other than sex, such as seniority, prior experience, or education.

Similarly, job descriptions--often the means through which wage discrimination has been perpetuated--are examined to determine whether they accurately reflect job functions and whether they would be helpful in documenting that substantially similar work was performed by men and women. In cases where personnel policy manuals and directives exist, the compliance officer attempts to ascertain whether they are applied uniformly without reference to the sex of the employees.[1377]

The documentation process is concluded with interviews of employees. The purpose of this step is to determine, irrespective of job descriptions and personnel records, what the employees actually do. Thus, it may be established through interviews that the nomenclature differentiating jobs

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1376. *Id.* at ch. 52 §§ b00-06

1377. *Id.*

held by men and women may be misleading and not reflect actual job functions.

Having completed the fact finding phase of the investigation, the compliance officer prepares a summary of the findings and conclusions. One or more meetings may then be held with the employer. If the employer questions the findings, the CO will forward the file to the area office for a review by the area director. After this review, another meeting is held with the employer. If the employer objects again, the file will be forwarded to the regional office for a review by the associate assistant regional director for wage and hour.[1378] In the final conference, the CO explains the specific nature of the violations that were found, if any, and the steps the employer must take in order to comply with the law.[1379] Although the CO attempts to ascertain the reasons for the violation, the main purpose of the meeting is to obtain the employer's agreement to comply and make arrangements for the payment of back wages.

1378. Although a review may be conducted by the associate assistant regional director for wage and hour, the regional solicitor may become involved if the possibility of litigation is indicated. DOL, ESA, FOH, supra note 1310, at ch. 52 § 13-16. When the possibility of litigation is raised, the FOH provides the CO with specific guidance and requires that the CO work closely with the regional solicitor. DOL, ESA, FOH, supra note 1310, ch. 80. This is important since, while the findings of a relatively routine investigation are only intended to convince an employer, the text and supporting materials of an investigation that may go to litigation, and thus undergo judicial scrutiny must conform to a higher standard of proof. Where unexpected problems arise during the investigation or the final conference, the CO is provided with another source of guidance in the form of a Joint Review Council which is flexible in its composition but usually consists of the associate assistant regional director for wage and hour and the regional solicitor's representative. Interview with Caren Clauss, Associate Solicitor of Labor, DOL, Feb. 20, 1975.

1379. Id. at ch. 53 § 601.

If the employer agrees to comply with the law, the CO explains that back wages must be computed and paid. Accordingly, the CO asks the employer to compute the back wages pursuant to DOL guidance.[1380] CO's are not permitted to settle for amounts less than is actually owed as back wages.[1381]

Once the back wages due are computed, the employer is asked to restore the wages within a reasonable time. This period of time usually is no longer than 60 days.[1382] In cases where the entire amount cannot be paid within or shortly after the 60 day period, the employer is asked to sign a waiver of the statute of limitations so that the amount found due will not be reduced by the tolling of the statute.

Once the amount and terms of the payment are agreed upon by both DOL and the employer, the complainant or the affected employees, in the case of a DOL initiated investigation, are advised. Although, up to this point, the employee may not even be aware that there is an investigation or of its exact nature[1383] and she or he is not provided with a copy of the investigative report,[1384] the employee must decide whether to accept or reject the back wages and the terms of the settlement or appeal DOL's decision.[1385] If the employee refuses to accept the settlement offered, she or he may not take any money in settlement if she or he desires to maintain her or his right to proceed against the employer privately.

[1380] DOL, ESA, FOH, *supra* note 1335, at ch. 53 § c01.

[1381] *Id*. at ch. 53 § § b01.

[1382] *Id*. at ch. 53 § c02.

If the employer takes exception to the compliance officer's findings and refuses to pay the back wages found due, the case is automatically referred to the area director for further conciliation--a process called "second leveling." If a case is "second leveled," and the employer has pledged to comply with the law in the future, the objective of DOL staff is to induce the employer to pay the back wages or, failing to accomplish that end, to determine whether litigation is warranted. Since it is the position of DOL officials that their principal mission is to ensure compliance with the law in the future and that the payment of back wages found due is of secondary importance,[1386] DOL will not always sue to collect back

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1383. This is especially true in the case of DOL initiated investigations since the FOH does not require COs to inform affected employees of the existance of the investigation. Many such employees, however, may be interviewed during the course of the investigation.

1384. McGowan interview, supra note 1354. It has been DOL's policy not to provide complainants with a copy of the investigative report even if they request it. DOL took this position in order to guarantee the confidentiality of the material in the file. However, because of requirements of the Freedom of Information Act (5 U.S.C.A. § 552 (1974)) DOL is currently studying its policy in this area and hopes to make some parts of investigative reports available to complainants when requested to do so. Id.

1385. See p. 448 infra. for a discussion of the appeal process.

1386. Interview with Warren D. Landis, Deputy Wage and Hour Administration, ESA, DOL, Feb. 20, 1975.

wages. Indeed, regions have established arbitrary monetary limits below which the solicitor will not institute suit to collect the back wages. The amount of this cut-off level varies from region to region and although the exact figures are not available to the general public, some regions have set cut-off levels at $1,500 and others at $800.[1387] This means that, assuming a pledge by the employer to end equal pay violations, if the amount of back wages found due is less than the level set by the region, the regional solicitor will not consider the case for litigation unless it involves fraud, criminal action, or a flagrant violation.[1388]

Should either the employee or employer question the amount of the settlement or the DOL procedures, an informal appeal process is available. Presently, however, there is no requirement in the FOH that either party be notified of the appeal right. In addition, it is important to note that DOL has published no rules, regulations, guidelines, or public relations materials explaining what the process entails. One DOL official stated that, "every employer knows that if he doesn't like the CO's findings, he can write us a letter."[1389] DOL officials in Washington would not detail the employer or employee appeal rights. In fact, a DOL official observed that if the appeal process were formalized, he would be "tied down" by it and would be unable to respond as rapidly as is now the practice.[1390] Clearly, DOL is remiss in its failure to provide adequate notice of its appeal process. A formalized, but expeditious, appeal process could be used effectively to improve the quality of work of DOL staff and provide the public with greater confidence in the efficiency of the EPA compliance program.[1391]

[1387] Clauss interview, supra note 1324.

[1388] Id.

[1389] Landis interview, supra note 1386.

[1390] Id.

A review by Commission staff of over 25 EPA investigative reports,[1392] almost all of which were complaint initiated, found that the investigations were, generally, of an acceptable level of competency. These files were from investigations based on complaints which had been received in written form, by anonymous letter, and by anonymous phone calls. There was no apparent difference between the conduct of an investigation based on an anonymous complaint and those initiated as the result of allegations from identified sources.

Each of the investigations found EPA violations and almost two-thirds of the employers agreed to pay the back wages found due simply based on the CO's investigation. The files showed that the remaining investigations ended in court action to recover back wages and assure future compliance.[1393]

However, the investigation reports displayed some significant deficiencies in the compliant handling process. The average time required to conduct these investigations was approximately nine months. Moreover, in most cases, COs failed to examine fringe benefits and the impact of employee training programs on wages for possible EPA violations. Without exception, no CO informed either employee or employer of the existence of any DOL appeal process and

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1391. Moreover, in a recent case, a Federal district court ruled that EEOC must provide for a formal appeal process. Equal Employment Opportunity Commission v. Raymond Metal Products Company, 385 F. Supp. 907 (D.Md. 1974).

1392. Eighteen of these reports were selected by DOL for the Commission staff to review and thus, may not be typical of DOL investigation.

1393. In many of the cases that were litigated, the court restored less than had been found due by DOL.

probably as a result no one availed her or himself of this administrative procedure. Finally, the files did not indicate a consistent policy of conducting followup reviews on employers found to have violated the EPA, although the existence of such a practice is crucial to the achievement of compliance.[1394]

A DOL policy which has potential negative impact on complainants is that in cases where the CO is unable to detect a violation the file contains little more than correspondence. DOL officials confirm the existence of this procedure and state that it serves to reduce the administrative burden on COs.[1395] However, the policy also makes any analysis of the sufficiency of the COs judgment impossible. Therefore, meaningful management reviews by DOL personnel are impeded, along with the ability of complainants to challange effectively the negative finding of the CO.

[1394] For example of continuing violations after an initial finding of noncompliance by a Federal agency, see U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity 249-52* (January 1975).

[1395] McGowan interview, *supra* note 1353. DOL has recently stated that:

> The alleged deficiencies are in fact the result of the Wage-Hour policy of not reporting the compliance officer's activity during an investigation. The basic rule for report is to incorporate in the report only those matters which are at issue or which require resolution at some other level. Dunlop letter, *supra* note 1305.

More than one-third of the investigations reviewed indicated violations of other FLSA provisions such as minimum wage and overtime requirements. Indeed, some EPA violations were detected in the course of investigations conducted for alleged violations of other FLSA provisions. Only one investigation, however, indicated a violation of other Federal statutes prohibiting sex discrimination such as Title VII of the Civil Rights Act of 1964. Further, DOL investigators did not attempt to elicit information concerning possible violations of these other Federal laws through detailed job analyses or through interviews with employees or employers.[1396]

[1396] DOL has recently informed this Commission that:

> As a matter of policy Wage-Hour compliance officers are required to observe and report violations of other laws disclosed during the course of their compliance activities. However, it is not cost-effective nor would it be administratively appropriate to use Wage-Hour resources for purposes other than investigation and enforcement related to Wage-Hour programs. Dunlop letter, supra note 1305.

The EPA compliance process has been the subject of considerable criticism from women's rights groups. This criticism has ranged from allegations of inadequate investigations[1397] to charges that violations are settled for less than the amounts due.[1398]

[1397] It has been alleged that, in a case involving women meatpackers at Trunz Meats, Inc., the compliance officer found no violation in spite of the fact that the only difference between the duties of men and women meatpackers was that a few of the men did occasional heavy lifting. It was further charged that the employer successfully misled the compliance officer by shifting women employees to unskilled jobs on the day that the investigation was conducted. Similar cases involving Merrill, Lynch, Pierce, Fenner and Smith and the City University of New York were also cited. Letter from Dee Estelle Alpert, Coordinator of the NOW Subcommittee on Compliance Agencies (NOW National Compliance Task Force), to the U.S. Commission on Civil Rights, Nov. 1, 1974. Similarly, the President of the Massachusetts Chapter of the Women's Equity Action League has cited inadequacies of Wage and Hour investigations in the academic sector. Telephone interview with Athena Theodore, President, Massachusetts Chapter, Women's Equity Action League, Feb. 28, 1975.

A letter from Gloria Semenuk, Coordinator of the New Jersey National Organization for Women Task Force on Employment to the U.S. Commission on Civil Rights dated October 16, 1974, noted other deficiencies in the DOL compliance process. The letter alleged that the investigation and settlement of a complaint against the Hoffman-LaRoche Company took an inordinate length of time (22 months), that complainants were unduly pressured to accept the settlement, that the payment of back wages was inadequately supervised, and that the compliance officer refused to investigate charges of harassment. According to DOL the Hoffman-LaRoche matter has not been finally closed by the Wage and Hour Administration and full investigation is being made of the allegations that it was not properly handled. Dunlop letter, *supra* note 1305.

[1398] Although CO's may not settle for less than the amount due, regional solicitors may decide that the merits of a particular case are such that they would rather settle for less than the full amount of back wages due than have to litigate the matter in court. Clauss interview, *supra* note 1324. In the Hoffman-LaRoche case, however, it has been alleged that back wage claims were settled for approximately 10 percent of the actual amounts due. Semenuk letter, *supra* note 1397.

Moreover, most cases referred to the regional solicitor's office for litigation are returned to the area office for reinvestigation.[1399] Indeed, the solicitor may require the CO to return to the employer several times to obtain additional information. In one case, for example, the compliance officer reinvestigated the same case no less than 35 times at the solicitor's request.[1400]

It is the position of the Office of the Solicitor that compliance officers should initially do rough investigations and that upon referral to him or her, the regional solicitor should dictate the scope of a complete investigation.[1401] The EPA, however, is clearly directed toward administrative settlement of violations rather than systematic litigation. Further, if area officials were to strictly adhere to this policy, inadequate initial documentation might result in their inability to obtain voluntary settlement of EPA violations.

Conversely, the fact that most investigations conducted by area office staff are inadequate for litigative purposes brings into question their adequacy for administrative enforcement. Employers might more frequently comply voluntarily if confronted with specific findings that would clear[illegible] be supportable in court. In a case in Region III, for example, the employer, in his letter to the area director rejecting settlement, cited his counsel's opinion that the case developed by the compliance officer did not prove violations of the EPA.[1402]

[1399] Clauss interview, supra note 1324.

[1400] The requests asked for more precise information on such matters as job duties and segregation of employees. The area director objected to expending the effort required to obtain this information without a commitment from the solicitor that he would subsequently take action on the case. Ultimately, the information was gathered and suit was filed. Case processed in the Hyattsville Area Office, Region III, DOL.

[1401] Id.

[1402] Hyattsville Area Office case, supra note 1374.

Generally, when the Solicitor's staff finds EPA investigative files inadequate, it is because they are lacking documentation. It is asserted that compliance officers often fail to look into the specific duties of employees and thus provide no bases for determining whether jobs are substantially equal.[1403]

A possible reason for this deficiency in EPA investigations is that they are the most difficult of the compliance officer's responsibilities. In a minimum wage case, for example, the compliance officer's factual determination that any employees are being paid at less than the minimum rate would be sufficient to support the finding of a violation. In EPA cases, however, the CO must also attempt to evaluate, on a relative basis, the duties, functions, and responsibilities of employees. While this might be relatively simple where the jobs being evaluated consist of a specific manual function, such as weight lifting or assembly line procedures, the evaluation of professional and administrative jobs requires the assessment of responsibilities that are frequently unspecific and difficult to quantify. That these kinds of job evaluations may tax the capabilities of Wage and Hour compliance officers is attested to by the fact that the Office of the Solicitor has had to hire independent consultants to conduct job evaluations, particularly with respect to institutions of higher education.[1404]

[1403] Clauss interview, supra note 1324. Similarly, in cases where employers have refused to comply with the EPA and compliance officers must compute wage underpayments for possible litigation, the amounts are often merely estimates rather than figures derived from precise computations. Id.

[1404] Id. According to DOL, however:

> The necessity of hiring independent consultants to conduct job evaluation in investigations being litigated is not a reflection of the Wage-Hour compliance officer's ability but rather the necessity in a contested litigation action to counter expert witnesses of the defendant. The occasion for such expert witnesses is rare. Dunlop letter, supra note 1305.

B. Court Enforcement

In fiscal year 1974, 698 cases were referred from Wage and Hour area offices to regional solicitor's offices for court enforcement.[1405] These referrals resulted in 177 lawsuits being filed and 86 cases being settled out of court.[1406] In fiscal year 1973, 418 cases were referred, for the initiation of litigation, resulting in 100 lawsuits and 110 out of court settlements.[1407] Thus, the Office of the Solicitor finds a great number (62 percent in fiscal year 1974 and 50 percent in fiscal year 1973) of EPA referrals unsuitable for litigation. These cases are returned to the area offices from which they are referred. If the regional solicitor determines that there is a violation of the EPA but declines to file suit for other reasons, the area office will notify the complainant or in the case of a DOL initiated investigation, the affected employee, that a private action may be brought. Similarly, if the solicitor's ground for rejecting the case is that there appears to be no violation, the complainant or affected employees will be notified of the DOL finding, and are advised that private suit may be brought.[1408]

[1405] Interview with Caren Clauss, Associate Solicitor of Labor, DOL, Jan. 20, 1975.

[1406] *Id*.

[1407] *Id*.

[1408] DOL, ESA, FOH, *supra* note 1335, at ch. 53 § g03. McGowan interview, *supra* note 1309.

As a result of lawsuits and out of court settlements in fiscal year 1974, the Office of the Solicitor obtained $16,914,967 in underpayments to employees. For fiscal year 1973, the figure was $10,914,967.[1409] DOL has gotten some relief for affected employees in most of the EPA cases it has handled. In the period from the beginning of July 1965 to the end of November 1974, the Office of the Solicitor initiated 745 actions. Ninety-eight of these cases were litigated to final dispositions, with DOL winning 70 and losing 28. Of the remaining cases, 30 DOL lawsuits were dismissed for technical reasons, 395 were settled favorably to DOL, and 222 were pending as of November 30, 1974. Thus, DOL obtained no relief at all in only 58 of the 523 cases which were resolved during this period.

[1409] Clauss interview, supra note 1324. Seven million dollars of this sum is attributable to a settlement with the American Telephone and Telegraph Company for EPA violations in May 1973. For a discussion of the AT&T settlement, to which EEOC and the Department of Justice were also parties, see Chapter 5 infra.

Normally, the decision as to whether to file suit on a complaint is made by the regional solicitor. Only those cases involving national employers are referred to the headquarters Office of the Solicitor. In most cases, DOL seeks not only the award of underpayments, but also injunctions to prevent future violations of the Act. Thus, having obtained an injunction, DOL is in a position to ask the court to find the employer in contempt of court should future violations occur.[1410]

The Solicitor's authority to bring an action for "liquidated," or in effect, double damages, is seldom invoked. This is due, in part, to the prevailing belief at DOL that employers who violate the EPA do not do so willfully, and that liquidated damages are punitive.[1411] A more practical reason, however, is that under this section employers are entitled to a jury trial, which is a more time consuming process.

Similarly, the referral of cases to the Department of Justice for criminal prosecution is reserved for the most "flagrant violators" of the

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1410. Id.

1411. Id. For a discussion of liquidated damages see pp. 414-15 supra of this report.

EPA. In fact, no cases have been referred for this purpose.[1412]

The current priority of the Office of the Solicitor is to bring more actions to enforce the EPA with respect to professional and administrative employees. Of particular priority are actions against institutions of higher education. These actions will involve a good deal of staff time and will be expensive. For example, independent consultants have been and will be hired to do job evaluations for university professorships.[1413] Clearly, the expansion of EPA coverage to include professional employees (including university faculties) requires an expansion of staff resources to assure that resources need not be diverted from traditional EPA cases.

[1412] Id.

[1413] Id. The Solicitor plans to bring actions against 10 universities in early 1975.

VI. Coordination

A number of Federal agencies in addition to DOL enforce statutes which prohibit discrimination in employment based on sex. Included among these agencies are the Equal Employment Opportunity Commission; the U.S. Civil Service Commission; the Department of Health, Education, and Welfare; the Department of Commerce; and the Department of the Treasury.[1414] Since the payment of unequal wages based on sex is a violation of these Federal statutes, it is important that agencies enforcing these laws and DOL interpret them in a uniform manner and that maximum use be made of the compliance resources of each agency. It is only through extensive coordination that these laws can be made understandable to employers and those the statutes were designed to protect. Moreover, without coordination there may be a lack of adequate setting of priorities; duplicative data collection, compliance reviews, and complaint investigations; inconsistent findings; and unequal application of Federal sanctions.

1414. Other Federal agencies which enforce prohibitions against sex discrimination in employment include the Department of Justice--Civil Rights Division and Law Enforcement Assistance Administration,--and the Federal Communications Commission. Moreover, the Office of Federal Contract Compliance of the Department of Labor, along with 16 compliance agencies to which it has delegated responsibility, enforce Executive Order 11246, as amended, which forbids Federal contractors from discriminating in their employment practices on the basis of sex. Exec. Order No. 11246, 3 C.F.R. 1964-1965 Comp., p. 339.

Coordination must essentially be on two levels. First, since policy is usually set in the headquarters office it is important that officials on that level agree on compliance standards. Second, since most actual compliance review and complaint investigation activity takes place in the field, it is necessary for agency staff at that level to share information concerning those employers that they have investigated or plan to investigate, including the nature of any discriminatory employment practices they have found.

Title VII of the Civil Rights Act of 1964,[1415] which created the Equal Employment Opportunity Commission, prohibits many forms of sex discrimination other than unequal pay based on sex. Every violation of the EPA, however, is also a violation of Title VII. Nonetheless, there are differences between what EEOC and DOL consider to be an equal pay violation. For example, the two agencies differ on the questions of fringe benefits and permissible training programs.[1416]

1415. 42 U.S.C. § 2000e (1970).

1416. For an analysis of policy differences between the two statutes and between EEOC and DOL on EPA matters, see pp. 431-36 supra. DOL asserts that:

> The statement that EEOC and DOL differ in their application of their respective laws to training programs is incorrect. Both agencies treat wage differentials resulting from training programs from which one sex is excluded as not being a reason other than sex for such wage differentials to exist. Dunlop letter, supra note 1305.

When EEOC began to develop its guidelines on sex discrimination it discussed with DOL staff their interpretation of the Equal Pay Act.[1417] After DOL refused to change its policies on certain issues, EEOC adopted a contrary position.[1418] Thus, an employer may be in conformity with DOL requirements and yet be in violation of Title VII as interpreted by EEOC. In addition, where a violation is found under the EPA, an employer need only restore back wages and assure future compliance; however, under Title VII the employer may well be required to alter promotion practices and adopt an affirmative action plan to equalize employment opportunities for all.

Although the FOH alerts COs of the existence of Title VII's coverage, it make no mention of these policy differences, and DOL compliance officers are not required to counsel complainants on the various interpretations of the two agencies. Complainants, therefore, are not notified that they might be better served by moving under Title VII, rather than, or in addition to, the Equal Pay Act.[1419]

1417. The Equal Pay Act was adopted in 1963 and Title VII was passed in 1964.

1418. Telephone interview with Susan Ross, former staff member, Office of the General Counsel, EEOC, Feb. 27, 1975.

1419. The possible benefit that a complainant may derive as a result of EEOC's more liberal policy interpretations may be negated by the fact it takes EEOC at least 18 months to get to a complaint while it takes DOL approximately only 3 months.

There appears to be little coordination between DOL compliance staff and EEOC investigators. Whether a CO attempts to coordinate with EEOC field staff is purely dependent upon how strongly coordination is emphasized by regional and area directors.[1420]

The lack of coordination between EEOC and DOL staff working on EPA is exemplified by the fact that DOL compliance staff will not communicate to EEOC the existence of a Title VII violation which is reported to them by a complainant. Instead, complainants are directed to contact EEOC on their own.[1421] According to the FOH, the reason for this practice is to protect the identity of the complainant.[1422] Yet, DOL could ask the complainant's permission to refer the complaint to EEOC rather than simply telling the complainant to write to EEOC herself or himself. Moreover, in many instances, DOL could refer the complaint to EEOC with the name of the complainant stricken. In those instances where a strong prima facie case in such a complaint is set forth, EEOC might move against the company charged as a result of a Commissioner charge.[1423]

[1420] Landis interview, *supra* note 1386. EEOC staff agree that there has been a minimum amount of communication between their agency and DOL staff on EPA matters. Telephone interview with Peter Robertson, Director, Office of Federal Liaison, EEOC, Feb. 12, 1975. EEOC has indicated in its guidelines that there is a relationship between the two statutes and that interpretations of DOL will be considered in cases involving a violation of both Acts. 29 C.F.R. § 1604.8 (1974).

[1421] *Id*.

[1422] DOL, ESA, FOH, *supra* note 1335, at ch. 50 § f02(b). For a further discussion of this point, see p. 442 *supra*.

[1423] See Chapter 5 *infra* for a discussion of Commissioner Charges.

In those instances where a DOL compliance officer identifies a Title VII violation in the course of a FLSA review, he or she is to report it to his or her immediate supervisor who has the discretion of forwarding it to EEOC. DOL keeps no records of such referrals, nor is there any record of referrals from EEOC to DOL.[1424] DOL describes its coordination with EEOC on equal pay matters as merely consisting of occasional referrals of complaints and exchanges of information on specific cases.[1425] Although the heads of both EEOC and DOL are members of the Equal Employment Opportunity Coordinating Council (EEOCC), which is responsible for coordinating the policies and activities of Federal agencies with employment discrimination responsibilities, DOL basically has limited its participation on the Council to matters concerning the Office of Federal Contract Compliance (OFCC).[1426] The subject of equal pay has not been raised.[1427]

[1424] Landis interview, supra note 1386.

[1425] Id.

[1426] Telephone interview with George Travers, Director, Program, Policy, and planning, OFCC, DOL, Feb. 20, 1975.

[1427] Id. For a discussion of the EEOCC, see Chapter 6 infra.

The U.S. Civil Service Commission's Bureau of Intergovernmental Personnel Programs (BIPP), is concerned with State and local government personnel systems. BIPP, under the Intergovernmental Personnel Act (IPA),[1428] is charged with administering merit system standards set forth in the Act and monitoring the compliance of State and local governments with them.[1429] One of the standards set forth in the IPA prohibits sex discrimination. Since the EPA did not apply to State and local government employment until 1974, there was no formal coordination concerning the IPA and the EPA until recently, when meetings were held to discuss interpretations of law. There is presently no coordination of compliance activities.[1430]

The Department of Health, Education, and Welfare (HEW) is responsible for enforcing Title IX of the Education Amendments of 1972,[1431] which prohibits sex discrimination in federally funded education programs.[1432] Among the areas covered by Title IX is employment. Thus, an equal pay violation by a university which is a recipient of Federal funds also would be barred by Title IX.

[1428] 42 U.S.C. § 4701 (1970). BIPP guidelines which touch on sex discrimination are found in 5 C.F.R. § 900.501-900.506 (1974).

[1429] For a discussion of the responsibilities and activities of the Civil Service Commission under the Act see Chapter 2 supra.

[1430] McGowan interview, supra note 1354. DOL has reviewed instructional materials prepared for BIPP compliance personnel.

[1431] 20 U.S.C.A. § 1681 (1974).

[1432] For a discussion of the enforcement of Title IX, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Volume III, To Ensure Equal Educational Opportunity chs. 1 and 3 (January 1975).

As of March 7, 1975, HEW had not published guidelines setting forth the definitive coverage of the Title. On June 20, 1974, it published proposed guidelines and asked for comments by October 15, 1974. The draft guidelines adopted, essentially, the same position on fringe benefits as DOL, i.e., that a fringe benefit plan is not discriminatory if it allows for equal payments by men and women although they may not receive equal periodic benefits. As indicated earlier, this is not the position of EEOC or the position taken by this Commission.[1433]

In a 1973 agreement with DOL, HEW, in order to avoid duplication of effort, pledged to consult officials in cases where there appeared to be violations of the EPA, and also in cases of dual jurisdiction.[1434] In turn, DOL agreed to refer to HEW matters discovered during its investigations which were violations of Title IX. In line with the agreement, DOL had instructed its compliance staff to consult with HEW staff prior to conducting reviews of institutions subject to Title IX.[1435] Actual coordination between DOL and HEW, however, seems to have been limited to a few referrals to DOL of possible EPA violations uncovered in the course of HEW compliance reviews.[1436]

[1433] See pp. 432-33 supra for a full discussion of this matter. See also letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights, to Peter E. Holmes, Director, Office for Civil Rights, HEW, Oct. 15, 1974.

[1434] Letter from Patricia A. King, Acting Director, Office for Civil Rights, HEW, to Francis W. McGowan, Director, Division of Equal Pay and Employment Standards, ESA, DOL, Feb. 7, 1973.

[1435] DOL, ESA, FOH, supra note 1335 at ch. 50 § 19(a), (b), (c) "Coordination with HEW Office for Civil Rights...in Equal Pay Matters."

[1436] Telephone interview with Roy McKinney, Acting Deputy Director of Planning and Program Coordination, Office for Civil Rights, HEW, Feb. 26, 1975. Telephone interview with Herbert Tyson, Acting Deputy Director, Higher Education Division, Office for Civil Rights, HEW, Jan. 31, 1975.

The Economic Development Administration (EDA) of the U.S. Department of Commerce provides Federal monies for public work programs under the authority of the Public Works and Economic Development Act,[1437] which prohibits all forms of sex discrimination in funded programs.[1438] EDA guidelines do not adequately explain the equal pay requirements that employers must follow; they only provide that sex-based wage discrimination is prohibited.[1439] There has been no coordination with DOL with regard to policy formulation.[1440]

In 1972, EDA formulated a system of field coordination with DOL. Under this system, EDA compliance staff would routinely consult with regional DOL personnel if sex-based wage discrimination is uncovered in the course of EDA compliance reviews, and all such cases would be sent to DOL for action, thereby suspending further EDA action until a DOL determination is made.[1441] The procedure further provides that the

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1437. 42 U.S.C. § 3121 et seq. (1965), as amended.

1438. 42 U.S.C. § 3123, Supp. II (1972).

1439. The Public Works and Economic Development Act of 1971, 13 C.F.R. § 311.44(b)(2)(viii); § 311.44(b)(4) (1974). The guidelines provide "The recipient shall not discriminate on the basis of sex in terms of wages paid." Id.

1440. Telephone interview with Arthur E. Cizek, Office of the Special Assistant for Civil Rights, Department of Commerce, Feb. 27, 1975.

1441. Memorandum from Larry A. Jobe, Assistant Secretary for Administration, Department of Commerce, to William W. Blunt, Jr., Deputy Assistant Secretary of Commerce, May 31, 1972.

DOL determination shall be made a part of the EDA report.[1442]

DOL has made COs aware of the EDA system of coordination in the FOH.[1443] The Handbook provides for close cooperation between DOL and EDA on all matters referred for EPA determinations.[1444] Some EDA field staff routinely contact DOL regional offices when questions of equal pay arise.[1445]

The Department of the Treasury's Office of Revenue Sharing (ORS) administers a program which redistributes Federal funds to 39,000 State and local governments under the State and Local Fiscal Assistance Act of 1972.[1446] The Act contains a prohibition against discrimination on the basis of sex in the provision of services and in employment.[1447]

[1442] Id. This EDA system of coordination has been incorporated into its instructions to the agency's compliance staff. Memorandum from Barbara A. Walker, Director, Office of Civil Rights, EDA, to All Civil Rights Officers and EDA Civil Rights Specialists, June 14, 1972. A subsequent memorandum was also sent reaffirming the EDA system. Memorandum from Barbara A. Walker, Director, Office of Civil Rights, EDA, to All Civil Rights Officers and EDA Civil Rights Specialists, Aug. 18, 1972.

[1443] DOL, ESA, FOH, supra note 1335 at ch. 50 § f17.

[1444] Id.

[1445] Telephone interview with Warren Plath, Equal Opportunity Specialist, Mid-Western Regional Office, EDA, Department of Commerce, Feb. 28, 1975; telephone interview with William H. Gremley, Equal Opportunity Specialist, Western Regional Office, EDA, Department of Commerce, Mar. 3, 1975. Nonetheless, many Department of Commerce officials are unaware of the formal agreement. Cizek interview, supra note 1440; telephone interview with David Lasky, Director of Civil Rights, EDA, Department of Commerce, Feb. 26, 1975; Plath interview, supra note 1445; and Gremley interview, supra note 1445.

[1446] 31 U.S.C. §§ 1221-1263 (Supp. III, 1973) and 26 U.S.C. §§ 6017A and 6687 (Supp. III, 1973). For a discussion of the general revenue sharing program and the civil rights activities of the Office of Revenue Sharing, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV, To Provide Fiscal Assistance (February 1975).

[1447] 31 U.S.C. § 1242(a), Supp. III (1973).

ORS guidelines, however, fail to define the obligations of State and local governments with regard to sex-based employment.[1448] According to officials of the Departments of the Treasury and Labor, although there may be some basis for coordination, no action has yet been taken in that direction by either agency.[1449]

While a clear need exists for close cooperation between agencies with requirements prohibiting sex discrimination in employment, the reality is that there is precious little. Equal pay violations are complex and difficult even for DOL's compliance staff to identify and correct. Yet, few agencies have made use of DOL's expertise in this area. There has been almost no attempt by the agencies to define in specific terms what acts constitute employment discrimination, no less than to deal separately with equal pay violation. Sharing of information on complaints, patterns of discrimination, priorities, or compliance strategies is rare. Each agency has more or less gone its own way except when, as one DOL official stated, "coordination was necessary" and even then it usually concerned only specific cases.[1450] This unfortunate state of affairs has undoubtedly caused hardship to many complainants and confusion and needless paperwork for many employers.

[1448] 31 C.F.R. § 51.32 (1974).

[1449] Telephone interview with Malaku I. Steen, Chief, Civil Rights Division, ORS, Department of the Treasury, Feb. 28, 1975. Telephone interview with Robert T. Murphy, Compliance Manager, Compliance Division, ORS, Department of the Treasury, Feb. 28, 1975. McGowan interview, supra note 1354.

[1450] Landis interview, supra note 1386.

Chapter 5

Equal Employment Opportunity Commission (EEOC)

I. Introduction

One of the major purposes of the historic Civil Rights Act of 1964 and its 1972 amendments was to outlaw employment discrimination.[1451] The Act created the Equal Employment Opportunity Commission as the agency responsible for the enforcement of this prohibition. As amended, the Act provides EEOC with authority over private employers,[1452] employment agencies, labor organizations,[1453] joint apprenticeship committees, State and local governments, and educational institutions. Subject to EEOC's jurisdiction are approximately 600,000 firms which employ 100 or more individuals, in addition to a substantial number of smaller employers for whom a total number is not available.[1454] Overall, in fiscal year 1972, private employer reports to EEOC accounted for more than 30 million workers out of a total civilian work force of more than 82 million. In addition, State and local governments and educational institutions have approximately 15 million employees.[1455]

[1451] 42 U.S.C. § 2000e (1970), as amended by 86 Stat. 103 (1972)

[1452] 42 U.S.C. § 2000e-2(a) (1970). The Act as amended defines an employer as a person engaged in an industry affecting commerce who has 15 or more employees.

[1453] 42 U.S.C. § 2000e - 2(c) (1970). Labor organizations which either operate a hiring hall or office, or have 15 or more members come under EEOC's jurisdiction.

[1454] This figure is based on EEOC's EEO-1 form receipts. This form is required only of private employers having 100 or more employees. The figure does not include the myriad of smaller employers under EEOC's jurisdiction. Thus, the total number of firms under EEOC's jurisdiction is much larger.

[1455] Interview with Herbert Hammerman, Chief, Employment Surveys Division EEOC, Mar. 13, 1974.

Blacks constitute approximately ten percent of the work force under EEOC's jurisdiction.[1456] However, in 1973 while 33.6 percent of the employees in the entire workforce held white collar jobs above clerical, only 12.2 percent of the blacks and 15.2 percent of persons of Spanish speaking background in the workforce held these positions. Conversely, 49.1 percent of the blacks and 48.5 percent of the persons of Spanish speaking background held blue collar, semi-skilled and unskilled jobs, while the overall percentage for these positions was 29.9 percent.[1457] Similarly, women constituted approximately 30 percent of the work force, but only 26 percent of them occupied white collar positions above clerical, while 37.8 percent of the men in the workforce held such jobs.[1458] Thus, despite the fact that employment discrimination has been illegal since the passage of the Civil Rights Act of 1964, discrimination still appears to be ingrained in the Nation's employment system.[1459]

1456. See chart on p. 471 infra.

1457. Id.

1458. Id.

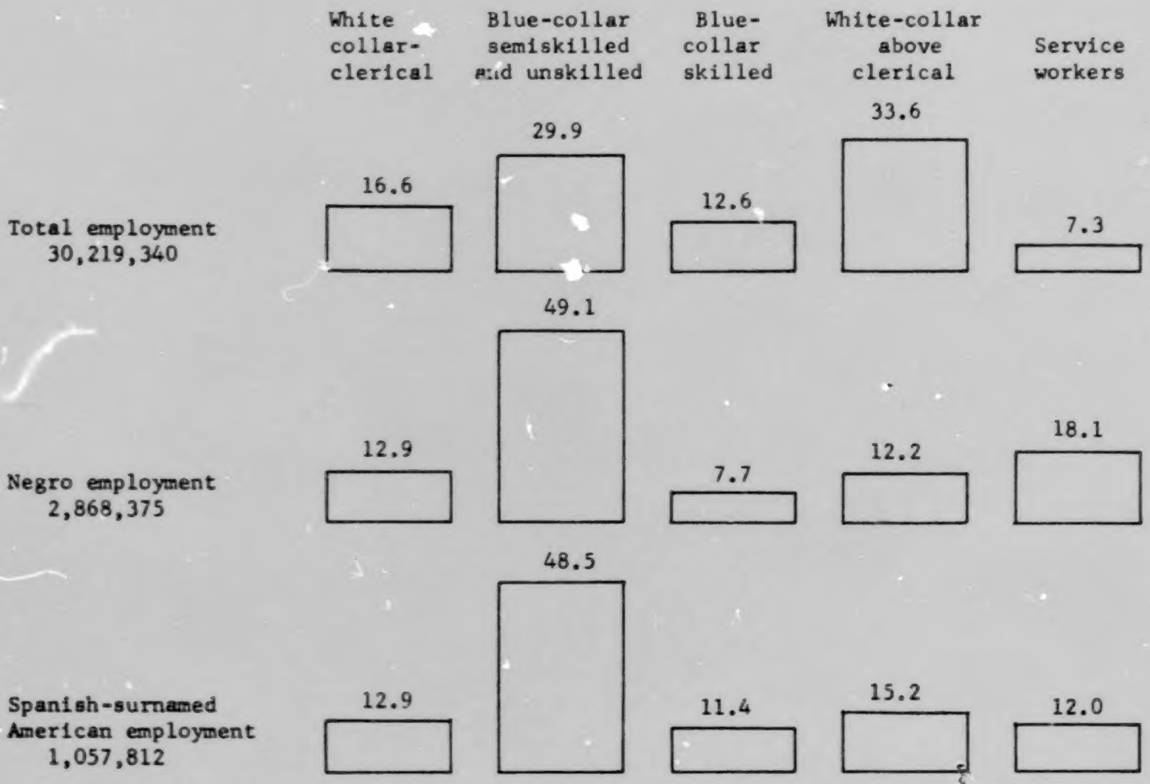
1459. Uemployment remains a state of affairs disproportionately affecting minorities. In 1964, 9.6 percent of the minority work force was unemployed while only 4.6 percent of the white workers did not have jobs. In 1972, there were still twice as many unemployed minority group workers as whites - 10 percent and five percent, respectively. Further, in 1964, for example, the median income of black families was 54 percent of that for white families. By 1970, the percentage had risen to only 61 percent of the white median income. Source U.S. Bureau of the Census, U.S. Census of Population: 1970, Detailed Characteristics. The 1970 census reports indicate that the median income of Spanish heritage families was 75 percent of that for white families. No data on family income are available for persons of Spanish heritage for 1960 or any earlier period. Similarly, if the comparison is limited to full-time workers, women's median earnings in 1971 were 60 percent of men's. Economic Report of the President 103, 104 (January 1973).

MINORITY & FEMALE PARTICIPATION IN THE WORK FORCE UNDER THE JURISDICTION OF EEOC

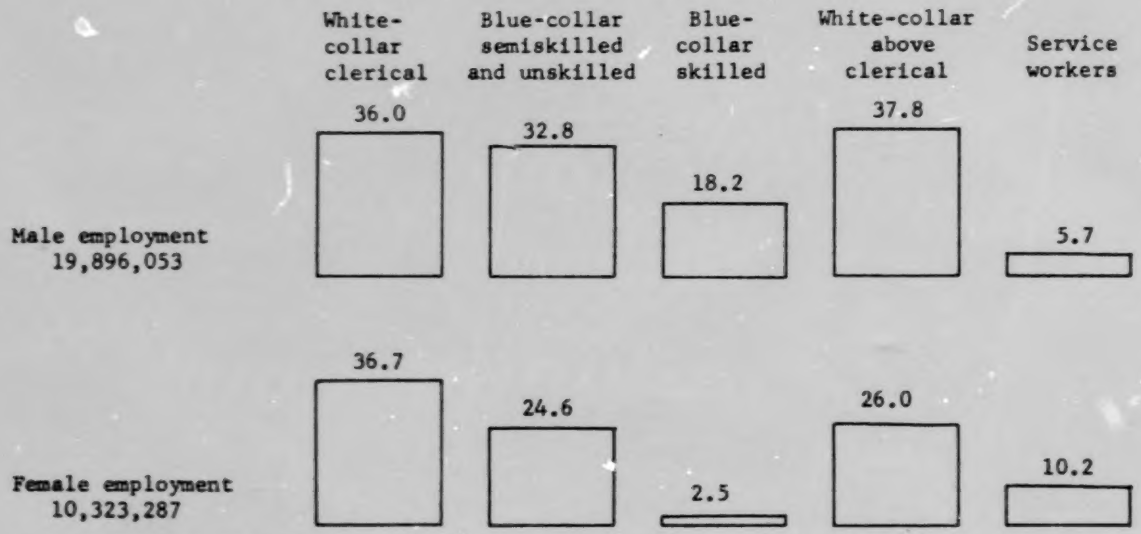
Job Category	Negroes		Spanish Surnamed Americans		Women	
	1970	1971	1970	1971	1970	1971
All Occupations	10.0	9.5	3.6	3.5	34.4	34.2
White Collar	4.7	4.6	1.9	2.0	43.6	43.2
Officials & Managers	1.9	2.0	1.0	1.1	10.2	10.9
Professionals	2.5	2.6	1.1	1.2	24.6	26.0
Technicians	6.2	6.1	2.2	2.1	26.4	26.3
Sales Workers	4.3	3.9	2.1	2.1	40.6	39.7
Office & Clerical	7.2	8.8	2.6	2.6	76.3	73.8
Blue Collar	13.1	12.7	4.9	4.9	22.5	21.5
Craftsmen	5.6	5.4	3.0	3.0	5.8	6.2
Operatives	14.1	13.8	4.6	4.7	29.4	28.1
Laborers	21.8	21.1	8.5	8.5	28.0	28.0
Service Workers	26.3	24.7	5.9	5.8	49.6	47.4

Source: EEOC, Employer Information Report EEO-1 (1972).

OCCUPATIONAL DISTRIBUTION OF MINORITY WORKERS VS. ALL WORKERS



OCCUPATIONAL DISTRIBUTION OF MEN AND WOMEN WORKERS



Source: Equal Employment Opportunity Commission, 8th Annual Report

II. Responsibilities

Under the Act, a wide range of employment practices is made illegal. Employers are forbidden to refuse to hire or to discharge individuals on the basis of race, color, religion, sex, or national origin. Neither may they discriminate against employees with respect to compensation, terms, conditions,[1460] or privileges of employment. An employer may not segregate or classify persons in a way which would tend to deprive them of employment opportunities or otherwise adversely affect their employment status.

Similarly, labor organizations may not exclude or expel from their membership or otherwise discriminate against individuals on the basis of their race, color, religion, sex, or national origin, nor may they cause or attempt to cause an employer to discriminate.[1461] In addition, the Act forbids employers, labor organizations, or joint labor-management committees controlling apprenticeship or other training or retraining programs, including on-the-job training programs, to discriminate against any individual in admission to, or employment in, any program established to provide apprenticeship or other training.[1462]

The employers who are subject to the terms of the Act, and thus over whom EEOC has jurisdiction, are those "engaged in an industry affecting commerce who has 15 or more employees for each working day in each

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1460. Terms and conditions of employment include various factors, such as bonuses, company housing, employee stock purchasing plans, lunch and rest periods, merit raises, and employee discounts.

1461. Under 42 U.S.C. § 2000e(d) (1970), a labor organization is defined as one engaged in industry affecting commerce. If such an organization has 15 or more members, it is deemed to be so engaged.

1462. 42 U.S.C. § 2000e-2 (1970).

of twenty or more calendar weeks in the current or preceeding calendar year...."[1463] The Act excludes from EEOC's jurisdiction the United States Government, the District of Columbia Government, Indian tribes, and bona fide private membership clubs other than labor organizations. State and local governments as well as educational institutions are subject to EEOC's jurisdiction as a result of the 1972 amendments to the Act.

EEOC's primary responsibility is to end employment discrimination through the enforcement of the Act. In doing so, the agency's functions are to investigate charges[1464] of discrimination, to attempt to resolve them through conciliation, and, as a result of the 1972 amendments to the Act, to file and prosecute lawsuits against those respondents subject to its jurisdiction where conciliation efforts fail. Suits against State and local governments can be filed only by the Department of Justice.[1465]

[1463] 42 U.S.C. § 2000e(b) (1970).

[1464] In EEOC's terminology, a charge is a complaint, a charging party is a complainant, and a respondent is a party complained against. Charges may be filed by aggrieved individuals, by EEOC Commissioners, or by third parties on behalf of aggrieved individuals.

[1465] Under the Civil Rights Act of 1964, EEOC could only attempt conciliation, and had no court enforcement powers. Where EEOC determined that suit was warranted, it referred cases to the Department of Justice (DOJ) for action. With the enactment of the 1972 amendments, EEOC obtained the authority to sue private employers, labor organizations, employment agencies, and private educational institutions. EEOC and DOJ had concurrent jurisdiction to file such suits alleging patterns or practices of discrimination until March 24, 1974, at which time EEOC became the sole agency responsible for such actions. DOJ, however, retained the sole power to bring suits against State and local governments.

Section 706(c) requires EEOC to defer its jurisdiction over charges it receives to State and local fair employment practice agencies where the State or local laws prohibit the discrimination alleged, and where the agencies are empowered to grant or seek relief from the discriminatory practice.[1466] The State and local agencies are given a 60 day period in which to resolve deferred charges, after which, if unresolved, they are returned to EEOC. Agencies to which EEOC defers charges are termed "706 agencies" because they meet the qualifications set forth in Section 706 for deferral. Agencies whose qualifications are pending are termed "notice" agencies and are notified of charges received by EEOC but are not actually deferred to.

Under Section 709(b) of the Act, EEOC has the responsibility for providing financial assistance to State and local agencies which assist EEOC by processing deferred charges[1467] EEOC is empowered to grant funds for research or for reimbursement of salaries of agency staff working with Title VII charges.

Besides reacting to complaints, EEOC functions in other areas. The Act gives the Commissioners the authority to conduct hearings for the purpose of investigating instances of employment discrimination. Additionally, any Commissioner may file a charge where he or she has reasonable cause to believe that unlawful discrimination exists.[1468]

[1466] 42 U.S.C. § 2000e-5(c) (1970).

[1467] 42 U.S.C. § 2000e-8(b) (1970). The nature of this assistance, as well as the requirements for deferral of charges are discussed on pp. *infra*.

[1468] 42 U.S.C. § 2000e-5(b) (1970). The use of this authority is discussed on pp. 547-49 *infra*.

Through its Voluntary Programs Office, EEOC provides technical assistance to employers who desire to take affirmative action to overcome the effects of past discrimination. The agency also attempts to negotiate voluntary affirmative action agreements with interested employers and labor organizations.[1469]

EEOC also has the responsibility of prescribing the record keeping requirements for those subject to the Act. Each employer and labor organization having 100 or more employees or members must prepare and submit to EEOC, on a yearly basis, an Employer Information Report Form or a local Union Equal Employment Opportunity Report.[1470] This report contains information regarding the racial, ethnic and sex make-up of the work force. EEOC compiles this information and issues periodic reports summarizing the data. Title VII, however, prohibits EEOC making information with respect to specific employers available to the public.[1471] This requirement of confidentiality has the effect of hampering the Federal Government's overall antidiscrimination effort. Not having access to information regarding employers' utilization of minorities and women, employees and private citizens are not able to assist in monitoring the progress being made by employers. Since the government's resources are limited, the failure to be able to enlist the aid of the general public in locating possible discriminatory patterns is most unfortunate.

EEOC's primary responsibility remains, however, the enforcement of Title VII of the Act through the processing and resolution of charges of discrimination. It is toward this end that the agency's organization and staffing is directed.

1469. Voluntary programs are discussed on pp. 568-70 infra.

1470. The nature of these reporting requirements is discussed on p. 487 infra.

1471. 42 U.S.C. § 2000e-8(e) (1970).

III. Organization and Staffing

A. Organization

1. The Chairman

The Chairman is the chief administrative officer of EEOC. Thus, he or she not only presides over meetings and proceedings of the Commissioners, but also manages and directs the agency. Section 705(a) of the Act empowers the Chairman to appoint all EEOC employees with the exception of the General Counsel and the Regional Attorneys, who must be appointed with the concurrence of the General Counsel and the Chairman.[1472] In this respect, the Chairman is in a position to exert considerably more influence over the operation of the agency than his or her fellow Commissioners.

Further, the administrative power of the Chairman is enhanced by the fact that the Office of Program Planning and Evaluation reports directly to him or her rather than to the agency's Executive Director.[1473] Thus, important functions such as planning, evaluation, and budget formulation are under the direct control of the Chairman.

It was through the utilization of his authority as chief administrator, for example, that former Chairman William H. Brown III, without a vote of the

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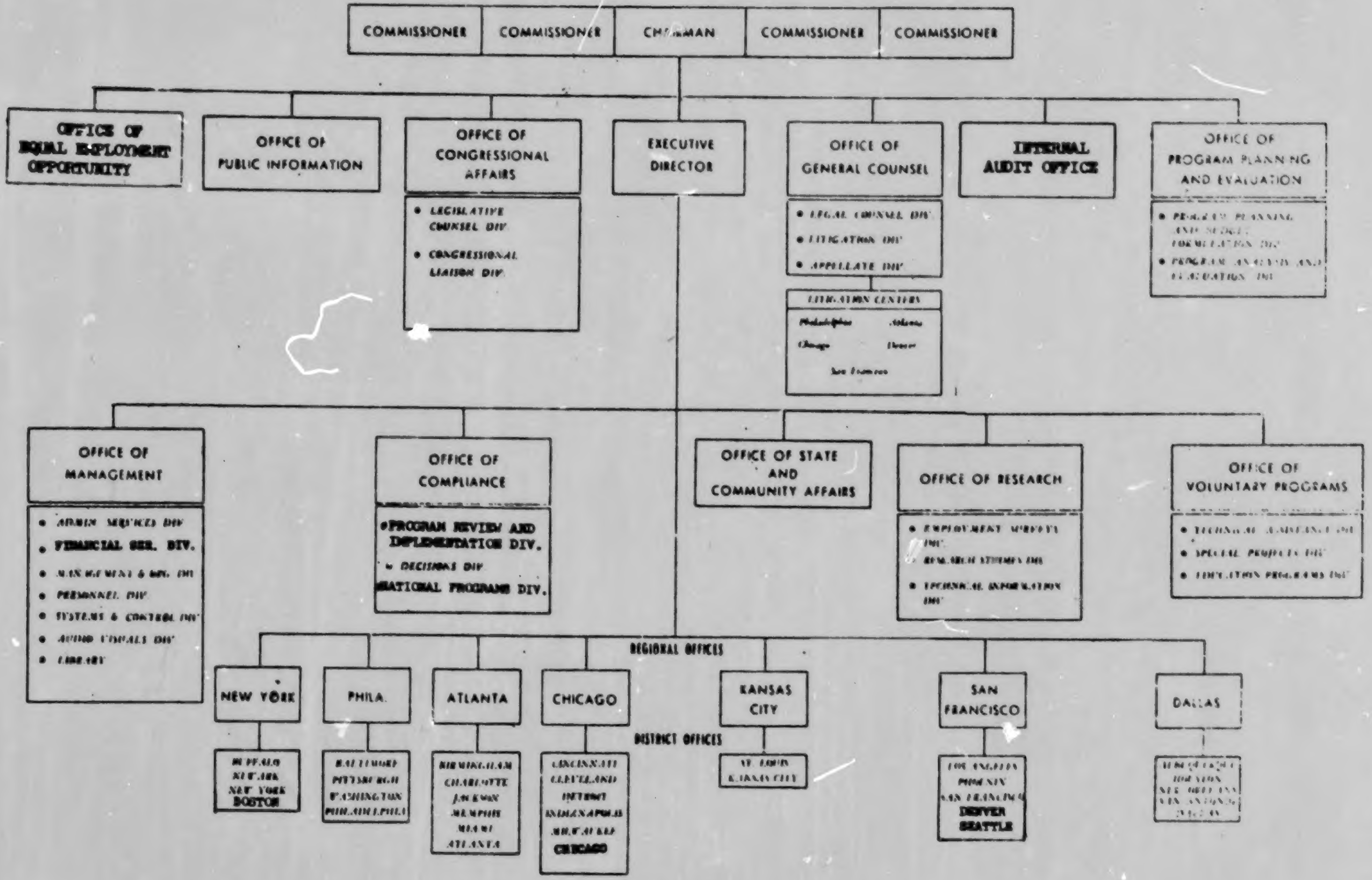
[1472] 42 U.S.C. 2000e-4(a) (1970). The General Counsel is also a presidential appointee. When Section 705 was amended to give the Chairman and the General Counsel this concurrent authority, the position of "Regional Attorney" did not exist. One could infer that this language refers to all attorneys in regional offices. Subsequent to the amendment, however, only five individuals, the Directors of the Regional Litigation Centers, were given the title.

[1473] Telephone interview with Harold Fleming, Acting Executive Director, Feb. 24, 1975.

ORGANIZATION
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION


COMMISSIONER
COMMISSIONER
CHAIRMAN
COMMISSIONER
COMMISSIONER
OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY
OFFICE OF PUBLIC INFORMATION
OFFICE OF CONGRESSIONAL AFFAIRS
• LEGISLATIVE COUNSEL DIV
• CONGRESSIONAL LIAISON DIV
EXECUTIVE DIRECTOR
OFFICE OF GENERAL COUNSEL
• LEGAL COUNSEL DIV
• LITIGATION DIV
• APPELLATE DIV
LITIGATION CENTERS
Philadelphia
Atlanta
Chicago
Denver
San Francisco
INTERNAL AUDIT OFFICE
OFFICE OF PROGRAM PLANNING AND EVALUATION
• PROGRAM PLANNING AND BUDGET FORMULATION DIV
• PROGRAM ANALYSIS AND EVALUATION DIV
OFFICE OF MANAGEMENT
• ADMIN SERVICES DIV
• FINANCIAL SER. DIV.
• MANAGEMENT & ORG. DIV
• PERSONNEL DIV
• SYSTEMS & CONTROL DIV
• AUDIO VISUALS DIV
• LIBRARY
OFFICE OF COMPLIANCE
• PROGRAM REVIEW AND IMPLEMENTATION DIV.
• DECISIONS DIV
NATIONAL PROGRAMS DIV.
OFFICE OF STATE AND COMMUNITY AFFAIRS
OFFICE OF RESEARCH
• EMPLOYMENT SURVEYS DIV
• RESEARCH STUDIES DIV
• TECHNICAL INFORMATION DIV
OFFICE OF VOLUNTARY PROGRAMS
• TECHNICAL ASSISTANCE DIV
• SPECIAL PROJECTS DIV
• EDUCATION PROGRAMS DIV
REGIONAL OFFICES
NEW YORK
PHILA.
ATLANTA
CHICAGO
KANSAS CITY
SAN FRANCISCO
DALLAS
DISTRICT OFFICES
BUFFALO
NEWARK
NEW YORK
BOSTON
BALTIMORE
PITTSBURGH
WASHINGTON
PHILADELPHIA
BIRMINGHAM
CHARLOTTE
JACKSON
MEMPHIS
MIAMI
ATLANTA
CINCINNATI
CLEVELAND
DETROIT
INDIANAPOLIS
MILWAUKEE
CHICAGO
ST. LOUIS
KANSAS CITY
LOS ANGELES
PHOENIX
SAN FRANCISCO
DENVER
SEATTLE
ALBUQUERQUE
HOUSTON
NEW ORLEANS
SAN ANTONIO
DALLAS

Supplied by EEOC

April 1975

Commission, established the National Programs Division in the Office of Compliance.[1474] This Division focuses its attention solely on systemic, nationwide discrimination.[1475] Another good example of the use of the Chairman's power was the efforts leading to the American Telephone and Telegraph (AT&T) settlement.[1476] In this instance, former Chairman Brown[1477] assumed direct supervision of a task force of EEOC employees who operated independently of established organizational units of the agency to bring about EEOC's most widely known discrimination settlement. His successor as Chairman, John H. Powell, Jr., established a special unit in the Office of the General Counsel to process charges alleging a pattern or practice of discrimination.[1478]

In addition to these responsibilities, the Chairman also maintains liaison with other Federal agencies, engages in negotiations on major cases, and makes public appearances on behalf of the Commission. The Chairman's personal staff consists of four special assistants and five support staff members. The special assistants are generally given specific program area responsibilities such as administration, personnel, or law. They function as advisors to the Chairman and provide liaison between his office and key managers.

[1474] Interview with David Copus, Deputy Chief, National Programs Division, EEOC, July 31, 1973.

[1475] See discussion of National Programs Division on p. 485 infra.

[1476] For a discussion of the AT&T case, see pp. 549-55 infra.

[1477] Copus interview, supra note 1474. William H. Brown, III was EEOC Chairman from May 1969 until January 1974, when John H. Powell, Jr., was confirmed by the Senate to succeed him.

[1478] Interview with John H. Powell, Jr., Chairman, EEOC, Apr. 12, 1974.

2. The Commission

The Equal Employment Opportunity Commission is composed of five Commissioners, not more than three of whom, according to the Act, may be members of the same political party. The Commissioners are appointed by the President, with the advice and consent of the Senate, for 5 year terms, with one term ending each year. The President designates one member as Chairman and another as Vice Chairman.[1479]

The Commissioners meet at the discretion of the Chairman. During the Winter and Spring of 1974, meetings were held every other Tuesday. And since March 20, 1975, the Commission met every Tuesday.[1480] Decisions are made by majority vote. The Commissioners generally vote on policy matters such as allocation of resources, the issuance of discrimination guidelines, the granting of contracts to State and local fair employment practices agencies, and the filing of lawsuits by the General Counsel. Only approximately 10 percent of the decisions issued by EEOC are decided by the Commissioners.[1481] These decisions are prepared by the Decisions Division of the Office of Compliance and circulated to each Commissioner. The Commissioners exercise only negative votes on decisions in that unless three Commissioners object to a proposed decision within three days,[1482] the decision is issued and becomes binding on similar future charges. The Commissioners exercise similar veto authority over amicus curiae briefs[1483] to be filed by EEOC.

[1479] 42 U.S.C. § 2000e4(a) (1970). As of June 9, 1975 the Commissioners were Lowell W. Perry, (Chairman), Ethel Bent Walsh (Vice Chairman), Colston A. Lewis, and Raymond L. Telles. John H. Powell, Jr., was Chairman of the Commission from January 1974 to March 19, 1975 when he resigned that position. Mr. Powell also resigned as a Commissioner effective April 30, 1975. Dr. Luther Holcomb was a Commissioner until his term expired on July 1, 1974. Dr. Holcomb continued to sit as a Commissioner until September 1974, since the Act provides that incumbents may continue to serve up to 60 days past the expiration of their term unless a successor is named. No successor had been named as of June 9, 1975.

[1480] Letter from Ethel Bent Walsh, Acting Chairman, EEOC, to John Buggs, Staff Director, U.S. Commission on Civil Rights dated April 17, 1975.

[1481] Interview with Evangeline Swift, Special Assistant to the Chairman, EEOC, Apr. 10, 1974. The remainder of EEOC decisions are issued by district offices following precedents set by the Commissioners in previous similar cases. For a discussion of this process, see pp. 519-20 infra.

The Commissioners are empowered to conduct hearings for the purpose of uncovering violations of the Act in given regions or localities. Toward this end, they may summon witnesses and subpoena evidence. Geographic areas and industries with poor compliance histories, i.e., low minority and female employment and potential for increased utilization of these groups, have been usual targets for hearings.

Any Commissioner may also file a charge of discrimination where he or she has reasonable cause to believe that the Act has been violated, although no complaint has been filed with EEOC. [1484] These "Commissioners charges" have traditionally been utilized in connection with a hearing or to protect the identity of a complainant. They are now also used to initiate pattern or practice cases as well as to initiate investigations of the National Programs Division. The Commissioners are also responsible for reviewing and approving: decisions; petitions for subpeonas; lawsuits; _amicus curiae_ participation; consent decrees; conciliation agreements; organizational changes; EEOC publications; contracts in excess of $2,500; the designation of 706 agencies and their funding; and financial assistance to the private bar. [1485]

[1482] Any one Commissioner may file objections to a proposed decision. If this occurs, an attempt is made to conform the decision to the objections, but if this is not possible then the decision is voted upon by the full Commission. Interview with Ethel Bent Walsh, Acting Chairman, EEOC, Raymond L. Telles, Commissioner, EEOC, Ronnie Blumenthal, Special Assistant to Acting Chairman Walsh, Pat Cerna, Special Assistant to Commissioner Telles, and Benjamin F. Kersey, Special Assistant to Commissioner Colston A. Lewis, Apr. 24, 1975.

[1483] An amicus curiae or "friend of the court" brief is one which is filed by a party who is interested in the outcome of the case, but is not a litigant. Prior to the 1974 amendments, this was the only court action in which EEOC could participate. Recently, EEOC filed an amicus curiae brief in DeFunis v. Odegaard, 416 U.S. 312 (1974), a well publicized case in which a white individual alleged that the University of Washington discriminated against him in that his application for admission was rejected while those of minorities with lesser qualifications were accepted. Although this case concerned admissions to a university and not employment, the concept of affirmative action was under broad attack. While EEOC urged the Court to uphold the position of the university, the U.S. Civil Service Commission urged the Department of Justice to file a brief on behalf of DeFunis. Further, although the U.S. Commission on Civil Rights wrote to the Department of Justice requesting that it file a brief on behalf of the university, neither the Department of Justice nor the Department of Health, Education, and Welfare ultimately took a position on the case. It is interesting to note that these two agencies remained silent over the wishes of their chief civil rights officials, who urged support for the university. Thus, despite the fact that the Supreme Court held that the case was moot, EEOC took the most progressive position of the enforcement agencies.

There appears to be a substantial disparity between the duties of the Chairman, who must perform all of the above responsibilities in addition to significant administrative duties, and those of the other Commissioners. The Commissioners are well aware of this disparity of responsibilities, and some have complained that EEOC Chairmen have wielded much more influence over the operation of the agency than is statutorily justified. There is reason to question whether the present duties of the Commissioners are sufficient to justify their full time status.[1486] If the present structure of the Commission is to be retained, a more resourceful use of the time and abilities of the Commissioners must be developed.[1487]

[1484] Commissioner charges are discussed on pp. 547-49 _infra_.

[1485] Additionally, Commissioners make public appearances, meet with members of Congress, visit regional and district offices, and decide Freedom of Information Act Appeals. _Id_.

Each of the Commissioners, with the exception of the Chairman, has a staff consisting of two special assistants and two support staff.[1488]

1486. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 89 (1971) /hereinafter referred to as Enforcement Effort report/. On May 13, 1974, Commissioners Lewis, Holcomb, and Walsh requested that General Accounting Office Administrator, Elmer B. Staats issue a legal opinion defining the respective rights and responsibilities of the Commission and the Chairman. On September 19, 1974, Administrator Staats responded indicating for example, that it is the full Commission which has the authority to issue standards for contracts and other use of funds. J.W. Singer, "EEOC Censures Chairman, White House Probes Leadership" National Journal Reports 315, 316 (Mar. 1, 1975). For another indication of the problems between the Commissioners and the Chairman, see The Washington Post, Mar. 4, 1975, Editorial, p. A14. A report prepared by management consultants under contract with EEOC recommended that the Commissioners should have the responsibility for establishing policy, approving the budget, approving procurement policy, deciding and approving cases for suit and reviewing, recommending, and approving organizational changes. The report recommended that the Chairman be responsible for providing operational direction, approving personnel actions, implementing procurement contracts, and representing the Commission before other agencies such as OMB, and that he have concurrent authority with the Commissioners in approving budgetary and organizational changes. Booz-Allen and Hamilton, Inc., "Report on Organization, Management, and Information Systems, EEOC", 4,5 (Nov. 4, 1974).

1487. The Commissioners, for example, might assume a more direct role in the compliance activities of the agency. One Commissioner, for example, could be responsible for assuring that conciliation agreements and consent decrees are monitored. Another might concentrate on voluntary compliance and still another on relationships with State and local civil rights agencies.

1488. Walsh et al. interview, supra note 1482.

3. Headquarters

a. Office of the Executive Director

The Office of the Executive Director manages the field offices and provides direction to the Office of Compliance, the Office of Management, the Office of State and Community Affairs, the Office of Research, and the Office of Voluntary Programs. These offices give procedural guidance to the field offices.[1489]

The Executive Director[1490] is assisted by a staff of 20 including a Deputy Executive Director, five staff assistants, a Field Operations Unit, and an Office of Federal Liaison. The Field Operations Unit, staffed with field coordinators, provides liaison between the Executive Director and the regional and district offices. Each coordinator is assigned several regions to oversee. A training academy, which reports directly to the Executive Director, has been established to provide uniform training to investigators and conciliators.

The Office of Compliance had a total staff of 102 and was composed of an Investigations Division, a Conciliations Division, a Decisions Division, and a National Programs Division. At the beginning of fiscal year 1974, the Investigations Division and the Conciliations Division were combined to form a Program Review and Implementation Division, which performs the same functions as the former units. With the exception of the National Programs Division, the Office was responsible for providing technical assistance to the field in the processing of charges. The Investigations Division, for example, had prepared a manual entitled "Compliance Procedures" which set forth guidelines for field personnel in conducting investigations and conciliations. The Decisions Division prepares draft decisions on charges raising new issues of law or fact, i.e., those on which the Commission has not taken a position in the past, which are presented to the Commission.

1489. Interview with Thomas Cody, Executive Director, EEOC, July 16, 1973.
1490. This key position has been vacant from February 1974 to June 1975.

The National Programs Division is primarily responsible for investigating and conciliating Commissioner charges against major national respondents.[1491] Former Chairman Powell stated that the functions of this Division might be subsumed by another unit which had been set up in the Office of the General Counsel to process charges alleging a pattern or practice of discrimination.[1492] It was contended that these charges which are similar to those now processed by the National Programs Division will be investigated by personnel in the Office of the General Counsel. The theory behind this proposed change is that, since the charges, in all probability, will end up in litigation, they should be investigated by legal staff.[1493]

The Office of State and Community Affairs has a staff of 15 and maintains liaison with and provides assistance to State and local Fair Employment Practices agencies. EEOC has a vested interest in the effective operation of these agencies.[1494] Section 706 of the Act requires that EEOC defer charges of discrimination to State and local agencies for action for a 60 day period, provided that they operate under a law which is comparable in scope to Title VII and that the agencies have comparable authority to EEOC.[1495] The determination as to whether a State or local agency meets the standards of Section 706 is made by the Commission upon the recommendation of the Office of State and Community Affairs and the regional director. In order to assist these agencies in establishing and maintaining these standards, the Office provides financial and technical assistance.[1496]

[1491] The National Programs Division also handles relevant individual charges pending against the respondents it is investigating. Walsh letter, supra note 1480.

[1492] Powell interview, supra note 1478. For a discussion of this suggestion, see pp. 543-46 infra.

[1493] In the past, staff in the Offic[illegible] the General Counsel has found investigations done by administrative [illegible]sonnel insufficient for litigative purposes. For further information on this point see pp. 516-17 infra.

[1494] Cody interview, supra note 1489.

[1495] 42 U.S.C. § 2000e-5 (1970).

The objective of the Office of Voluntary Programs is to secure the voluntary compliance of employers with Title VII. This Office has three divisions, the Technical Assistance Division, the Education Programs Division, and the Special Programs Division. The Technical Assistance Division provides assistance to employers, unions, and employment agencies in the development of affirmative action policies and procedures. The Education Programs Division encourages voluntary compliance by preparing educational materials, brochures, and exhibits for persons or groups affected by the provisions of Title VII. The Office of Voluntary Programs is also responsible for developing policies, standards, and procedures for the voluntary programs units in the regional offices.

The voluntary programs staff at headquarters consists of 26 staff members.[1497] Each of the regional offices has three staff members who work on voluntary compliance.[1498] These individuals are accountable to the regional directors, rather than to the Office of Voluntary Programs, with the result that the headquarters voluntary programs staff has little direct control over field activities.

[1496] The Office monitors the use of these funds by requiring the recipient agencies to submit periodic reports on activities and progress.

[1497] Walsh letter, supra note 1480.

[1498] A recent communication from EEOC indicates that Regional Voluntary Programs Officers will be transferred to the districts to provide better service to the public. Walsh letter, supra note 1480.

The Office of Research has a staff of 47 and is assigned the role of determining what statistical information is required by EEOC in planning and carrying out its functions, for developing the necessary procedures and reporting systems for obtaining this information, and for conducting indepth technical studies to supplement the activities of the other operating segments of the agency.

The Office of Research also has the responsibility for receiving the Equal Employment Opportunity Report forms which EEOC receives from private employers (EEO-1),[1499] labor organizations (EEO-2 and EEO-3), State and local governments (EEO-4),[1500] elementary and secondary schools (EEO-5), and higher education institutions (EEO-6). The information contained in these forms is computerized, analyzed, and compiled into an Equal Employment Opportunity Report on Job Patterns For Minorities and Women in Industry.[1501]

[1499] The EEO-1 form contains data only on the racial, ethnic and sex makeup of the workforce. It does not, for example, yield data on such important factors as turnover. This deficiency is amplified by the fact that the reports are utilized not only by EEOC, but also the Civil Service Commission and the Office of Federal Contract Compliance.

[1500] For further discussion of these forms see p. 573 *infra*.

[1501] Cody interview, *supra* note 1489. The Office of Research also uses EEO report data in the preparation of periodic reports covering individual industries, cities, and geographic areas. In fiscal year 1973, for example, the Office issued reports on the textile industry in the Carolinas and employment patterns in Cincinnati, Ohio. In September 1974, the Office issued its first report on minorities and women in State and local governments based on data gathered on its EEO-4 report forms. U.S. Equal Employment Opportunity Commission, *Minorities and Women In State and Local Government 1973* (September 1974).

Despite the fact that the Office of Research has access to this large body of statistical information, it has been of limited assistance to other components of EEOC in using it to target respondents. Potentially, this information could be useful in determining which industries or corporations should be brought into compliance first; but, instead, charge statistics, which can be misleading, and reviews of conciliation agreements and past compliance histories have provided the primary basis for these decisions.[1502] Additionally, the analysis of statistical information could shed light on the effectiveness of EEOC's compliance process as a whole and thereby provide a basis for reevaluating priorities and procedures.

The Office of Management has a total staff of 133 and consists of an Administrative Services Division, a Financial Services Division, a Management and Organization Division, a Personnel Division, a Systems and Control Division, an Audio Visual Division, and a library. The Office is responsible for the administrative functions of EEOC, such as personnel management, procurement, and contracting.

The Office of Program Planning and Evaluation is composed of a Planning and Budget Formulation Division and a Program Analysis and

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[1502] Walsh *et al*. interview, *supra* note 1482.

Evaluation Division. Its staff consists of 21 positions. The function of the Office is to review, analyze, and evaluate the headquarters operations as well as the activities of the regional and district offices. It also recommends new programs and changes in EEOC's policies, procedures, practices, and operations and is responsible for budget preparation and execution.[1503] It was this Office, for example, which developed the Resource Allocation Strategy, after having analyzed data from the district offices.[1504]

b. Office of Public Affairs

In addition to performing day to day media liaison, the staff of the Office of Public Affairs attempts to assure that the public is informed of its rights under the Act. Nonetheless, the Office did not issue a publication explaining the rights of complainants under the 1972 amendments until September 1974,[1505] two and a half years after they became effective. The Office has an authorized staff level of only 12 positions.[1506]

1503. Cody interview, supra note 1489 and Walsh letter, supra note 1480.

1504. The Resource Allocation Strategy, a method aimed at reducing EEOC's charge backlog, is discussed on pp. 533-37 infra.

1505. Equal Employment Opportunity Commission, Laws and Rules You Should Know (September 1974).

1506. One of the reasons for the small size of the Office is that EEOC has no centralized publications system. Each office is responsible for developing and releasing its own reports, an arrangement which has led to confusion and inefficiency.

4. Office of the General Counsel

Prior to the 1972 amendments, the responsibility of EEOC's Office of the General Counsel was limited to the filing of amicus curiae briefs in cases affecting Title VII, recommending unsuccessfully conciliated cases for suit to the Department of Justice, and house counsel work, such as enforcing demands for evidence, preparing contracts, and giving advisory opinions to the Commission. By granting it the power to file suit, the 1972 amendments to the act transformed EEOC from a conciliation agency to an enforcement agency. Implementation of these enforcement powers is vested in the Office of the General Counsel.[1507]

EEOC's organization chart indicates that the General Counsel,[1508] also a Presidential appointee, reports to the Commission, but the extent of the Commission's authority over him or her is not clear. Section 705(b)(1) provides, for example, that the General Counsel shall "...concur with the Chairman of the Commission on the appointment and supervision of Regional Attorneys."[1509] It appears from this language that the General Counsel may overrule the Chairman as well as be overruled by him or her in matters regarding the Regional Attorneys. Former Chairman Powell stated that he saw the General Counsel's relationship to him as the same as that of the

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1507. 42 U.S.C. § 2000e-5(f)(1) (1972).

1508. On March 19, 1975 EEOC's General Counsel, Williams A. Carey, resigned and as of June 9, 1975 no General Counsel had been appointed.

1509. 42 U.S.C. § 2000e-4(1970).

Executive Director, that of an employee.[1510] It can be well argued that the General Counsel should have a more independent status than that of other EEOC office heads.[1511]

The responsibilities granted EEOC by the Equal Employment Opportunity Act of 1972 required the expansion and reorganization of the Office.[1512] It is now composed of three divisions: the Litigation Division, the Appellate Division, and the Legal Counsel Division. In addition to handling lawsuits filed by headquarters, the Litigation Division provides overall supervision to the five Regional Litigation Centers.[1513] Each Litigation Center is directed by a Regional Attorney and is generally divided into three litigation groups[1514] headed by Associate Regional Attorneys. The litigation groups have the first line responsibility for prosecuting EEOC's lawsuits. They prepare and file EEOC's pleadings and briefs and represent the agency in all phases of litigation against regional violators of Title VII.[1515]

The Appellate Division of the Office of the General Counsel is responsible both for processing appeals of EEOC lawsuits as well as for preparing

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[1510] Interview with John H. Powell, Jr., Chairman, EEOC, Apr. 5, 1974.

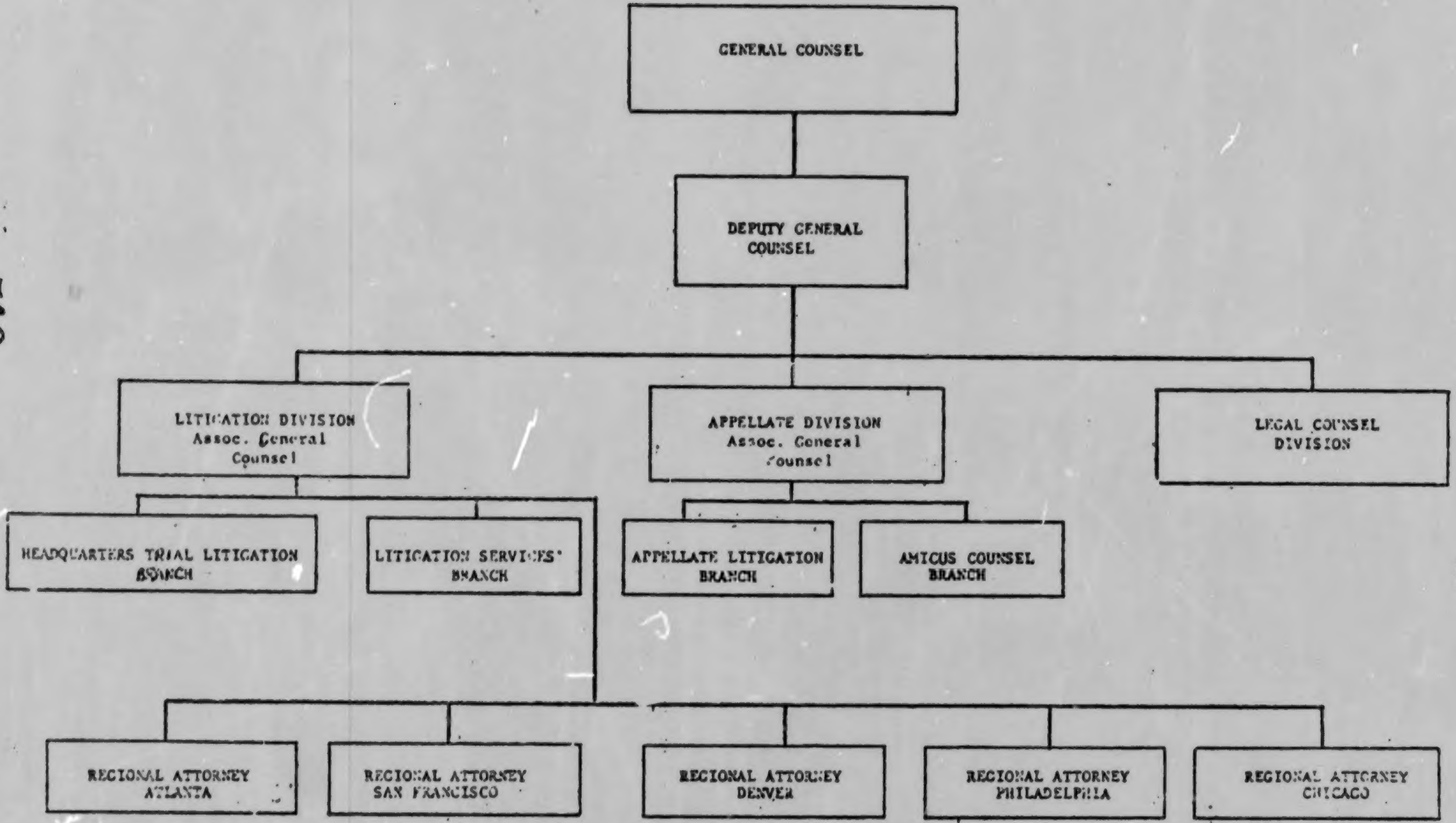
[1511] It is clear from the legislative history of the 1972 amendments that the amendment of Section 705(b) was intended to make the Office of the General Counsel more independent of the Commissioners. The Senate version of this amendment, which would have made the General Counsel completely independent of the Commissioners, was based on the theory that the Administrative Procedures Act requires that the prosecutorial and decisional functions of the Commission be firmly separated.

[1512] See organization chart on p. 492 infra. See also discussion of a special unit of this Office to handle Section 707 cases on p. 543 infra.

[1513] Regional Litigation Centers are located in Atlanta, Ga., San Francisco, Cal., Denver, Colo., Philadelphia, Pa., and Chicago, Ill. Each Litigation Center has approximately 26 attorney positions.

[1514] This organizational structure exists mainly to provide lines of supervision. There is no functional distinction between the units.

[1515] Interview with William A. Carey, General Counsel, EEOC, Aug. 15, 1973.


GENERAL COUNSEL
DEPUTY GENERAL COUNSEL
LITIGATION DIVISION Assoc. General Counsel
APPELLATE DIVISION Assoc. General Counsel
LEGAL COUNSEL DIVISION
HEADQUARTERS TRIAL LITIGATION BRANCH
LITIGATION SERVICES' BRANCH
APPELLATE LITIGATION BRANCH
AMICUS COUNSEL BRANCH
REGIONAL ATTORNEY ATLANTA
REGIONAL ATTORNEY SAN FRANCISCO
REGIONAL ATTORNEY DENVER
REGIONAL ATTORNEY PHILADELPHIA
REGIONAL ATTORNEY CHICAGO

EEOC OFFICE OF THE GENERAL COUNSEL

Chart supplied by EEOC

and filing amicus curiae briefs in cases to which EEOC is not a party. The Legal Counsel Division serves as house counsel to EEOC providing general legal services and advice to the Office of the General Counsel, as well as to other components of the agency. This Division, for example, is in the process of developing a procedural manual for litigation attorneys.

The success or failure of the Office of General Counsel will have a substantial impact on the effectiveness of EEOC as a whole. If the agency succeeds in obtaining further strong, precedent setting court decisions, it is expected that employers will become more cooperative in the conciliation process and in voluntarily improving their employment practices.

5. Field Offices

EEOC's basic functions are carried out in its field offices. It is in these offices that charges are filed, investigated, decided, and conciliated. The agency's field organization consists of regional offices, district offices, and Regional Litigation Centers.[1516]

a. Regional Offices

The fundamental role of the seven EEOC regional offices is to supervise the district offices within their jurisdiction.[1517] Each regional office has approximately 22 positions.[1518] The regional directors and deputy directors supervise the district offices with the assistance of regional compliance coordinators who monitor and evaluate compliance activities. In fiscal year 1973, one new position was added to each regional office to coordinate EEOC actions with State and local fair employment practices agencies.

[1516] Cody interview, supra note 1489.

[1517] See map on p. 494 infra for the locations of regional and district offices.

[1518] See organization chart on p. 495 infra.

EEOC REGIONAL OFFICES, DISTRICT OFFICES AND LITIGATION CENTERS

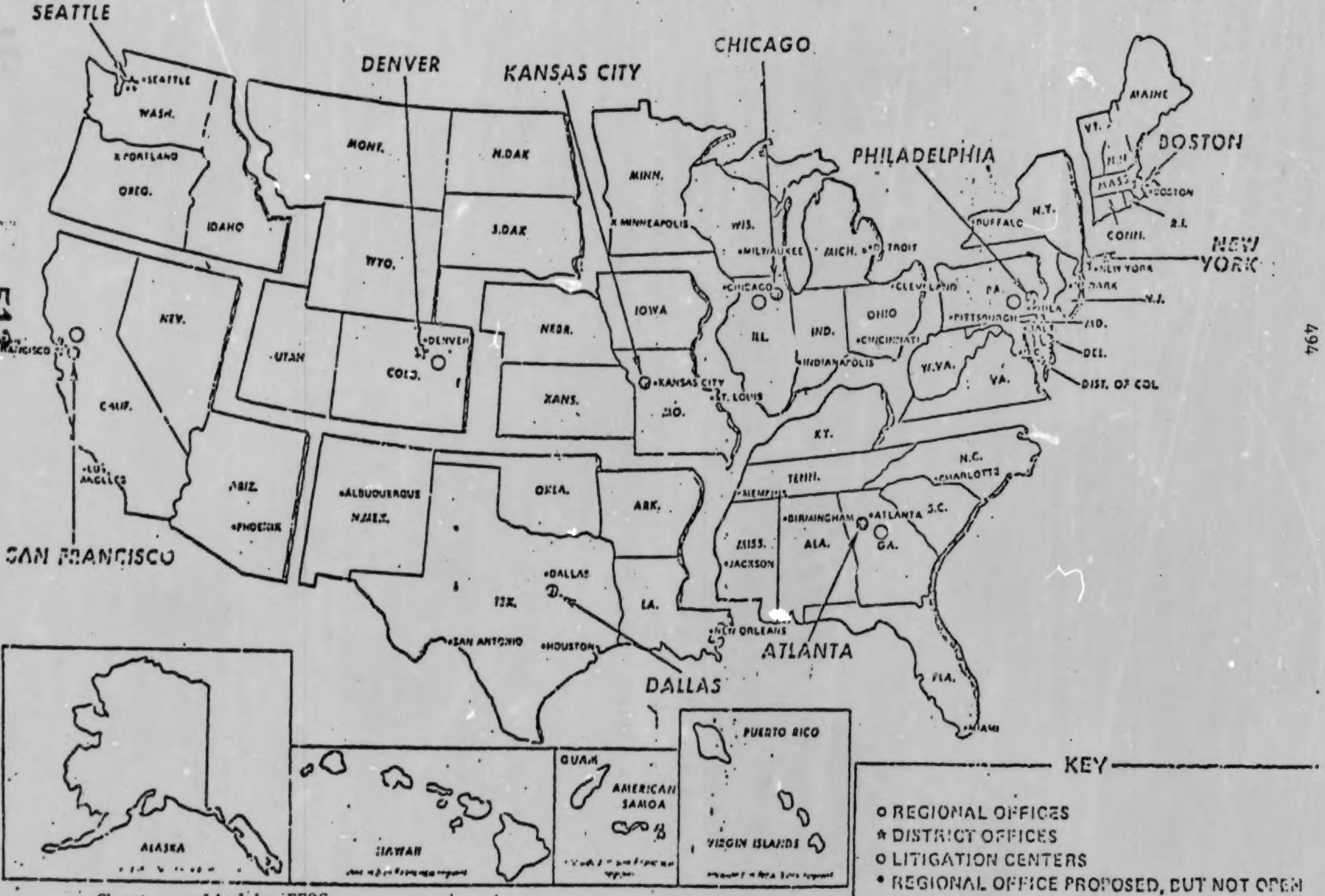
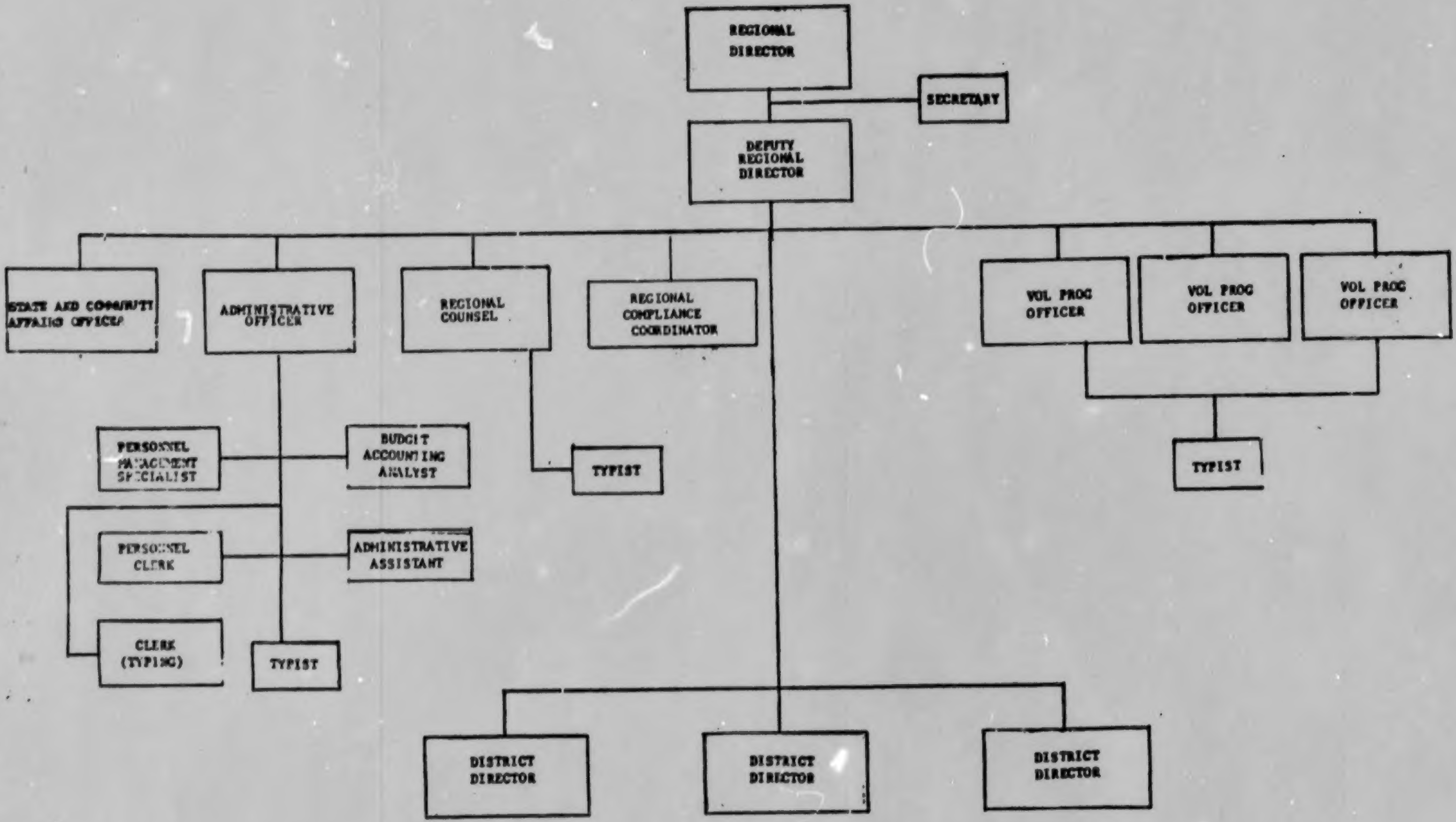

SEATTLE
DENVER
KANSAS CITY
CHICAGO
PHILADELPHIA
BOSTON
NEW YORK
SAN FRANCISCO
DALLAS
ATLANTA
WASH.
SEATTLE
PORTLAND
OREG.
IDAHO
MONT.
WYO.
N.DAK
S.DAK
MINN.
MINNEAPOLIS
WIS.
MILWAUKEE
MICH.
DETROIT
IOWA
NEBR.
KANS.
MO.
KANSAS CITY
ST. LOUIS
ILL.
CHICAGO
IND.
INDIANAPOLIS
OHIO
CLEVELAND
CINCINNATI
PA.
PITTSBURGH
PHILA
N.Y.
BUFFALO
NEW YORK
NEWARK
N.J.
MD.
DEL.
DIST. OF COL
W.VA.
VA.
KY.
TENN.
MEMPHIS
N.C.
CHARLOTTE
S.C.
GA.
ATLANTA
ALA.
BIRMINGHAM
MISS.
JACKSON
LA.
NEW ORLEANS
FLA.
MIAMI
ARK.
OKLA.
TEX.
DALLAS
HOUSTON
SAN ANTONIO
N.MEX.
ALBUQUERQUE
ARIZ.
PHOENIX
UTAH
COLO.
DENVER
NEV.
CALIF.
SAN FRANCISCO
LOS ANGELES
MAINE
VT.
N.H.
MASS.
BOSTON
R.I.
CONN.
ALASKA
HAWAII
GUAM
AMERICAN SAMOA
PUERTO RICO
VIRGIN ISLANDS
KEY
○ REGIONAL OFFICES
☆ DISTRICT OFFICES
○ LITIGATION CENTERS
• REGIONAL OFFICE PROPOSED, BUT NOT OPEN

Chart supplied by EEOC


REGIONAL DIRECTOR
SECRETARY
DEPUTY REGIONAL DIRECTOR
STATE AND COMMUNITY AFFAIRS OFFICER
ADMINISTRATIVE OFFICER
REGIONAL COUNSEL
REGIONAL COMPLIANCE COORDINATOR
VOL PROG OFFICER
VOL PROG OFFICER
VOL PROG OFFICER
TYPIST
PERSONNEL MANAGEMENT SPECIALIST
BUDGET ACCOUNTING ANALYST
TYPIST
PERSONNEL CLERK
ADMINISTRATIVE ASSISTANT
CLERK (TYPING)
TYPIST
DISTRICT DIRECTOR
DISTRICT DIRECTOR
DISTRICT DIRECTOR

EEOC REGIONAL OFFICE

Chart supplied by EEOC

Each regional office also contains a Voluntary Programs Unit, which attempts to provide assistance to employers in affirmative action techniques as well as to negotiate voluntary affirmative action programs. Voluntary programs units, for example, conduct seminars and workshops in affirmative action. Publications advertising these activities are distributed to regional employers. On the average, there are only three voluntary programs officers per regional office, an insufficient number to have an appreciable affect on private employers in the several States covered by each office.

b. District Offices

EEOC's 32 district offices are responsible for investigating, deciding, and attempting to conciliate charges of discrimination. A standard size district office has an authorized staff level of 40 positions, while a minimum size office would have approximately 20 positions. The 28 standard size district offices consist of a control unit, three investigations units, and two conciliations units.[1519] These units are supervised by a deputy district director, who, along with the district counsel, reports to the district director.[1520]

B. Staffing

In fiscal year 1973, EEOC had an authorized staff level of 1,909 positions, of which 1,293 were for professionals and 616 were for support staff. There were 236 positions allocated to administration, that is, the Offices of the Commissioners, Executive Director, Program Planning and Evaluation, Public Information, Congressional Affairs, and Management. The largest number of authorized positions (1,143) were allocated to compliance activities, 124 in the

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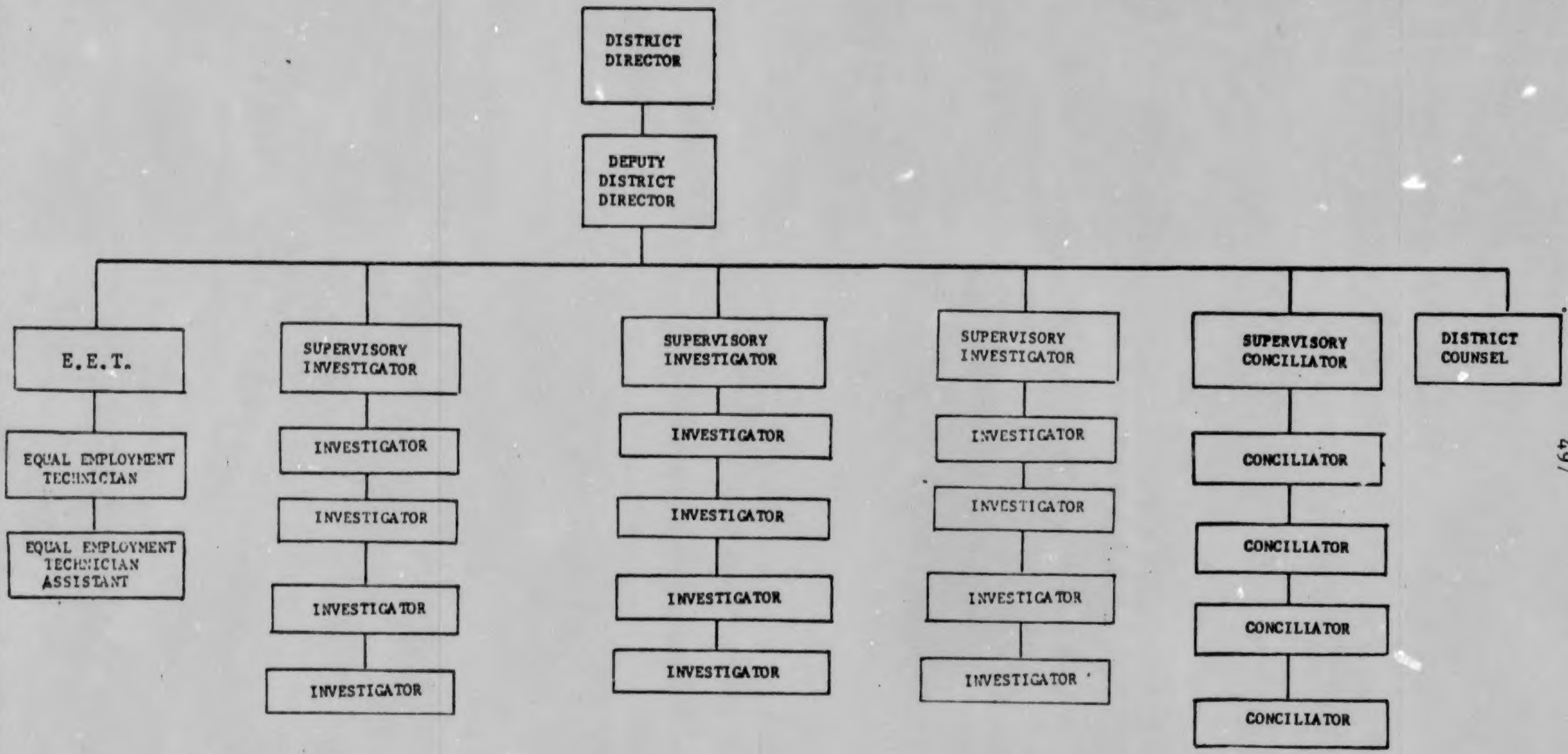
[1519] See organization charts on pp. 497-98 infra. The functions of these units are discussed on pp. 509-29 infra. In fiscal year 1974, decision writing units, called Technical Analysis Writer (TAW) units were abolished. TAW staff were assigned to investigative functions and all investigative staff were given decision writing responsibilities.

[1520] Cody interview, supra note 1489.


DISTRICT DIRECTOR
DEPUTY DISTRICT DIRECTOR
E.E.T.
EQUAL EMPLOYMENT TECHNICIAN
EQUAL EMPLOYMENT TECHNICIAN ASSISTANT
SUPERVISORY INVESTIGATOR
INVESTIGATOR
INVESTIGATOR
INVESTIGATOR
INVESTIGATOR
SUPERVISORY INVESTIGATOR
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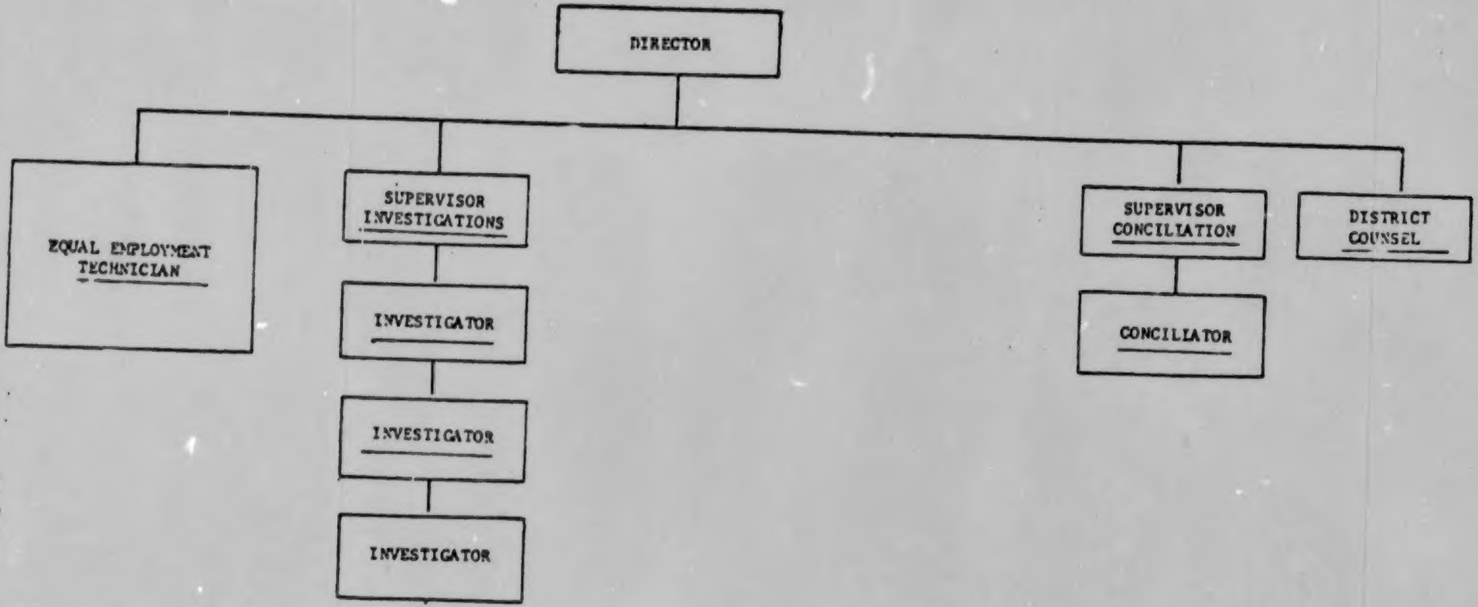
INVESTIGATOR
INVESTIGATOR
SUPERVISORY CONCILIATOR
CONCILIATOR
CONCILIATOR
CONCILIATOR
CONCILIATOR
DISTRICT COUNSEL

EEOC REGULAR SIZE DISTRICT OFFICE

Chart supplied by EEOC.


DIRECTOR
EQUAL EMPLOYMENT TECHNICIAN
SUPERVISOR INVESTIGATIONS
INVESTIGATOR
INVESTIGATOR
INVESTIGATOR
SUPERVISOR CONCILIATION
CONCILIATOR
DISTRICT COUNSEL

EEOC MINIMUM SIZE DISTRICT OFFICE

Chart supplied by EEOC

Office of Compliance and 1,019 in the field offices. Affirmative programs, including the Offices of Voluntary Programs, State and Community Affairs, Research, and field staff in Voluntary Programs accounted for 108 authorized positions.

EEOC received 479 additional positions for fiscal year 1974, 350 professional and 129 support staff. Of this number, 25 positions were added to the Office of Compliance, 309 to the field offices, 18 to the Office of State and Community Affairs, 17 to the Office of Research, 100 to the Office of the General Counsel, and 10 to the Office of Management.[1521]

Nevertheless, EEOC continued to be plagued by personnel problems which hamper its efforts to fulfill its mission.[1522] As of May 1973, nearly 25 percent (440) of its authorized positions were vacant.[1523] EEOC's vacancy problem was worsened by the fact that many of the vacancies were

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1521. In fiscal year 1975 EEOC received 33 additional positions, giving it a total staff compliment of 2,421.

1522. This problem has existed since EEOC first began operation. See Enforcement Effort report, supra note 1486, at 87-94, and R. Nathan, Jobs and Civil Rights ch. 2 (1969), prepared for the U.S. Commission on Civil Rights by the Brookings Institution. Moreover, it has been alleged that with respect to overall personnel strength, based on an examination of the fiscal year 1973 workload, there seemed to be no relation between charges resolved and positions allocated or onboard. Letter from Senators Harrison A. Williams, Jr., Chairman, and Jacob Javits, Ranking Minority Member, Committee on Labor and Public Welfare, U.S. Senate, to John H. Powell, Jr., Chairman, EEOC, Sept. 10, 1974.

1523. In the Federal Government, eight to nine percent is considered a normal vacancy rate and a vacancy rate over 15 percent is considered a significant problem.

in crucial areas. The Office of the General Counsel, for example, one year after it obtained the power to file suit, had 105 vacancies out of 270 positions. Thus, the Office charged with administering the agency's most powerful compliance tool was operating at less than two-thirds of its capacity. Further, as late as January 1974, more than 20 percent of authorized investigator and conciliator positions were vacant.[1524] By August 1974, many of EEOC's vacancies had been filled.[1525] For example, only 9 percent of the positions in the regional and district offices were vacant. In the Office of the General Counsel, however, as of February 1975, there were still vacancies in more than 14 percent of its authorized positions.[1526]

1524. EEOC has recently indicated that "historically, the reason for the vacancy rate was caused by the fact that while we reserved slot increases each slot had to be allocated and classified before it could be filled." Walsh letter, supra note 1480.

1525. EEOC recently informed this Commission that as of February 28, 1975, it had only 182 vacancies out of 2,384 slots, a vacancy rate of 7.6 percent. Id.

1526. Walsh et al. interview, supra note 1482.

C. Personnel Management

EEOC's management continues[1527] to be hampered by a lack of clear definition of the roles of key personnel. In addition, there is poor communication of policy directives. These problems occur agencywide, but are particularly acute in the Office of the Executive Director and the Office of the General Counsel.

The role of the Executive Director has been ambiguous. The title suggests that he or she is the chief manager of the agency, and thus in charge of program as well as support units. Until an informal reorganization in March 1975, however, the Office of Management was not accountable to the Executive Director. Moreover, the Office of Program Planning and Evaluation is not responsible to the Executive Director. This situation had a dual result; i.e., the Executive Director had to rely on the goodwill of the directors of these support Offices in order to manage program activities effectively, and the Chairman, to whom these Offices reported, was put in the position of being an operating as well as policy making figure. The Chairman not only presides over the Commissioners in the formulation of policy, but also has the major role, as chief administrator, in carrying out that policy. The result is that the Chairman has relied heavily on special assistants and personal staff to perform functions normally the responsibility of line managers.

[1527] EEOC's management problems were noted in *Enforcement Effort* report, *supra* note 1486, at 87-94, and U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort--A Reassessment* 81 (1973) /hereinafter cited as *Reassessment report*/. For an exhaustive treatment of EEOC's management and informations systems see Booz-Allen and Hamilton, Inc., *supra* note 29.

The communication of policy to staff responsible for carrying it out is done on an informal basis, and sometimes not at all. During fiscal year 1973, for example, the function of the Technical Analysis Writers (TAW) in the district offices was largely in limbo due to ineffective communication of policy. In some district offices, TAW units had been abolished and investigators wrote all decisions.[1528] In others, TAWs continued to function as decision writers. No definitive statement could be elicited from field staff as to what the status of the TAW function was, while headquarters staff stated that the function was to be abolished.[1529] Similarly, some field staff were unaware of whether or not the track strategy was officially in effect.[1530]

Nowhere in the agency has the problem of policy communication been more acute than in the Office of the General Counsel. In performing its responsibilities, i.e., the filing of suits in cases where conciliation has failed, it is important that the staff be kept informed of the agency's policies. This requires clear, written policy and procedure directives. Yet this kind of communication has been notably lacking. Written policy and procedure directives are usually issued to the field staff only in reaction to problems which have arisen, and some important policy directives have never been reduced to writing.

[1528] Interview with Lorenzo Traylor, Director, Los Angeles District Office, EEOC, Mar. 26, 1973, in Los Angeles, Cal.

[1529] Cody interview, supra note 1489.

[1530] For a discussion of this strategy for assigning resources, see pp. 533-37 infra.

It was the policy of that Office, for example, not to file pattern or practice lawsuits under Section 707(e) of the Act.[1531] This policy was of crucial importance in terms of reducing the scope of relief available to affected classes and requiring the agency to undertake conciliation as a pre-condition to suit. The General Counsel's policy of bringing actions exclusively under Section 706[1532] was communicated orally in meetings to the field staff. It was never, however, transmitted in writing, except that on the occasions when complaints were sent from the litigation centers to headquarters for review, the words "Section 707" were crossed out and the words "Section 706" substituted with no further comment.[1533] The demotion of several senior staff attorneys for violating the unwritten policy and filing suits under Section 707(e) resulted in a considerable amount of bad publicity for EEOC. This incident may well have been avoided had the policy been issued in written form as had been other less crucial policies, such as matters involving public speaking engagements by staff members. Similarly, as of March 1975, some 19 months after EEOC was given its power to file lawsuits, no procedural manual had been issued to staff attorneys.

D. Performance Management System

EEOC has taken some steps to improve its management process. In July 1972, the agency instituted a Performance Management System (PMS) in its field offices. PMS is a management by objective system[1534] consisting of broad program goals and short range, operating program objectives. Under PMS, each EEOC district office submits monthly reports to a regional office and to headquarters containing data which measure the district office's progress toward meeting its objectives.

[1531] 42 U.S.C. 2000e-6 (1970). See discussion on pp. 543-47 *infra*.

[1532] 42 U.S.C. 2000e-5 (1970).

[1533] Memorandum from William C. Oldaker, Regional Attorney, OGC, to Equal Employment Opportunity Commission, July 13, 1973.

EEOC has established as its broad program goals: the elimination of employment discrimination made illegal by Title VII; the provision of relief to individual victims of discrimination; the elimination of discriminatory features of employment systems; and the provision of support to develop and maintain an effective compliance process.

Short range, operating program objectives have been developed to reach these goals. EEOC's short range, operating program objectives are to obtain conciliation or settlement agreements which obligate respondents to take specific steps to provide relief to charging parties and members of classes which the compliance process covers and to eliminate illegal discriminatory features and effects from their employment systems. The program activities necessary to attain the program objectives are delineated, along with the organizational units responsible for these activities.[1535]

1534. A management by objective system is one in which program objectives are set within a given period of time and performance is measured by the attainment or lack of attainment of the objectives within the time period. EEOC's Performance Management System is part of a governmentwide system initiated by the Office of Management and Budget.

1535. Cody interview, supra note 1489.

PMS is supposed to supply EEOC managers with a clear statement of program objectives and the results to be obtained. As a reporting system, its purpose is also to provide periodic information on progress toward these goals and to serve as a management information system to support the decision making process. Presumably, results ascertained through this system may serve as a basis for reprogramming activities.

In July 1973, EEOC implemented the Work Measurement System (WMS), which is a rapid report method for keeping track of productivity and the utilization of personnel resources. This system replaces the Case Handling and the Work Progress Record reports which were more complicated and time consuming to prepare and less effective in measuring results.[1536] The WMS includes a Work Unit Report, which is a calendar month report of the work units which each district office produces in specific work functions. This report includes the number of charges that have been received, processed, administratively closed, and those forwarded to headquarters. PMS utilizes this WMS data.

PMS and WMS are essentially reporting systems designed to measure EEOC's progress and efficiency. They are, therefore, not solutions to the agency's broader administrative problems, but rather means of determining what and where the problems are. The PMS' short range goals, however, do not seem to address the major problems. The reduction of the charge backlog, for example, is not specifically included among either short or long range goals.[1537]

[1536] Id.

[1537] EEOC has recently written to this Commission that "all of the Performance Management System objectives which emphasize charge resolution are, in effect, backlog reduction activities." Walsh letter, supra note 1480.

A successful management by objectives system must have the full support of top management, since line managers have to be held accountable for the attainment of the objectives if their staffs are to achieve them. It was the intention of former EEOC Chairman John H. Powell, Jr., to delegate responsibility for the operation of the System to the Executive Director.[1538]

E. Policy

EEOC's external policy is set by the Commissioners. Examples of this type of policy include decisions on charges, guidelines, and manuals providing guidance in construing the requirements of the Act.[1539] EEOC's decisions and guidelines, while not binding on courts of law, are often given substantial weight in court opinions.[1540]

1538. Powell interview, supra note 1478. The Chairman's Office receives copies of the monthly PMS reports which are reviewed by his Special Assistants. EEOC recently informed this Commission that the Executive Director does in fact manage PMS. Walsh letter, supra note 1480.

1539. Walsh et al. interview, supra note 1482.

1540. The U.S. Supreme Court, for example, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), upheld EEOC's testing and employee selection guidelines. Since lower courts must adhere to precedents set by the Supreme Court, those guidelines now have the effect of law.

EEOC has issued guidelines on discrimination based on sex, national origin, religion, and on testing and selecting employees. These guidelines are part of EEOC's procedural regulations and do not have the force and effect of law on employers. They are, in essence, statements of how the Commissioners will rule on a charge falling within the area covered by the guidelines. They are the most broad and complete set of guidelines issued by a Federal agency.

EEOC's sex discrimination guidelines[1541] state that it is a violation of Title VII to maintain separate lines of progression and seniority systems based on sex. In addition, jobs may not be advertised or classified as "male" or "female" unless sex is a bona fide occupational qualification.[1542] Further, employers may not discriminate against women in the application of fringe benefits.[1543] The guidelines also specify that pregnancy is to be treated as a temporary disability, and should have that status with respect to the application of fringe benefits such as insurance and sick leave. One deficiency in EEOC's sex discrimination guidelines is that they permit employers to ask prospective employees to give their courtesy titles (Mr., Mrs., or Miss), a practice which is discriminatory in that it has the effect of asking marital status of women only.

EEOC's guidelines on religious discrimination[1544] maintain that it is violative of Title VII for an employer to refuse to hire or to discharge employees whose religion requires them to observe the Sabbath or other religious holiday on a normal work day, unless to do so would place an unreasonable hardship on the employer's business. The employer has the burden of proving that this hardship is unreasonable.

[1541] 29 C.F.R. § 1604.

[1542] Sex cannot be a bona fide occupational qualification (BFOQ) except in an extremely limited number of circumstances. For example, the refusal to hire an individual based on stereotyped characteristics of the sexes would be unlawful. An example of the limited type of situation in which sex would be a bona fide occupational qualification according to EEOC would be in hiring an actor or actress, where sex determines authenticity or genuineness. The burden of establishing that sex is a BFOQ rests with the employer.

[1543] One example of this is the requirement that women be paid equal weekly or monthly retirement benefits even if according to present actuarial tables this might result in their receiving larger total benefits than men.

[1544] 29 C.F.R. § 1605.

The national origin discrimination guidelines[1545] prohibit specific practices such as the use of English-language tests, where such tests are not job related and English is not the applicant's primary language. Also prohibited are the application of height and weight requirements to persons of a national origin that characteristically tends to fall outside national norms for height and weight, where these factors are not job related. Further, the guidelines provide that, where the purpose and effect of citizenship requirements is to discriminate on the basis of national origin, it is prohibited.[1546]

EEOC's testing and employee selection guidelines[1547] provide generally that, if a test or other employee selection process tends to reject minorities or females disproportionately, it must be validated; i.e., evidence must be produced to show that the test is a valid predictor of job performance. In addition, the test user must demonstrate that there are no other less discriminatory tests which are also valid predictors. The evidence required for validation must consist of empirical data indicating a significant correlation between the test and important elements of work behavior.

1545. 29 C.F.R. § 1606.

1546. The national origin discrimination guidelines were amended to this effect in order to conform with the Supreme Court decision in Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973).

1547. 29 C.F.R. § 1607.

In March 1975, EEOC developed proposed Guidelines on Work Allocation Procedures. The Commission prepared these important guidelines in response to indications that a disproportionate number of minorities and women, having been denied the opportunity to compete for length of service due to prior discriminatory practices, are being laid off by employers due to lack of seniority. The proposed guidelines state that, where an employer must reduce the overall workload, work allocation measures which do not have disproportionate impact on minorities and women should be used. Where layoffs are unavoidable, they must be based on a bona fide seniority system, which is defined in the guidelines as:

> one which does not displace a disproportionate number of female or minority group employees from the work force as a result of the employer's past discriminatory hiring, recruitment, or other employment practices. [1548]

The proposed guidelines were submitted for comment to the member agencies of the Equal Employment Opportunity Coordinating Council (EEOCC).[1549] The Departments of Justice and Labor and the Civil Service Commission opposed the issuance of the guidelines until the layoff issue is decided by the Supreme Court, while the Commission on Civil Rights maintained that it was EEOC's responsibility to keep the public informed of its interpretations of the law it enforces. As of mid-May 1975, the EEOCC had created a staff committee to determine if it were possible to revise the proposed guidelines in a manner acceptable to all of the member agencies.[1550]

1548. Attachment to Letter from Ethel Bent Walsh, Acting Chairman, EEOC, to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Mar. 28, 1975.

1549. Id. The members of the EEOCC are the Chairmen of EEOC, the Civil Service Commission, and the Commission on Civil Rights, the Secretary of Labor, and the Attorney General. See Chapter 6 of this report covering the EEOCC.

1550. Minutes of the May 2, 1975 meeting of the EEOCC. See also letters to Ethel Bent Walsh, Acting Chairman, EEOC, from Robert E. Hampton, Chairman, Civil Service Commission, Apr. 8, 1975; J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, Apr. 9, 1975; and Lawrence B. Glick, Acting General Counsel, U.S. Commission on Civil Rights, Apr. 15, 1975.

IV. The Compliance Process

A. Intake and Investigation

EEOC's primary method of enforcing Title VII is the processing of charges of discrimination. Such a charge may be filed by an individual, class of individuals,[1551] a third party on behalf of others,[1552] or a Commissioner.

In fiscal year 1974, 56,953 individuals filed charges of employment discrimination with EEOC. EEOC estimates that 71,000 individuals will be filing charges in fiscal year 1975.[1553] In fiscal year 1973, EEOC received charges of discrimination from 48,899 individuals, as compared with 32,840 in fiscal year 1972. Of the persons filing charges in fiscal year 1973, close to two-thirds, were blacks. Approximately one-half of all charges were filed by females, although not all females alleged sex discrimination.[1554]

Most respondents in fiscal year 1973 were private employers (70,937 charges). However, 1,626 charges were received against unions, 15,968 against State or local governments, and 2,516 against educational institutions.[1555]

[1551] Several individuals may make the same charge against the same respondent. The charges are processed together, although each individual must file a separate charge form. The group of individuals is treated as a class.

[1552] An individual may file a charge on behalf of an aggrieved person. During the course of the investigation, however, the investigator is required to secure an affidavit from the aggrieved person acknowledging that he or she is aggrieved.

[1553] Letter from John H. Powell, Jr., Chairman, EEOC to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Dec. 19, 1974.

[1554] The total number of charges received by EEOC (107,846) was greater than the number of charging parties (48,899). According to EEOC, which supplied the data, this discrepancy is due to the fact that many charging parties alleged more than one basis of discrimination, such as race and sex, or more than one allegation, such as hiring or promotion.

In spite of the substantial number of charges which EEOC has received against State and local governments, the agency has attached no special priority to their processing. The result is that most of these charges have become a part of the backlog.[1556] This is a particularly serious deficiency in light of the increased Federal funding which these employers are receiving through revenue sharing as well as the public service orientation of most State and local government agencies. It has been long recognized, for example, that if major social and interest groups are represented in bureaucracies, there will be greater responsiveness to these groups in the application of governmental services.[1557]

Neither has EEOC attached priority to discrimination by employment agencies.[1558] Despite the relatively low number of charges against them, discrimination by an employment agency potentially adversely affects minorities and women to a greater degree than discriminatory practices by an employer in that employment agencies are a source of job applicants for many employers.

[1555] In addition, 1,223 charges were filed against employment agencies and 346 against joint apprenticeship committees. The remaining 1,222 charges were identified by EEOC as unspecified. EEOC Computer Printout, Analysis of Charge Receipts, Fiscal Year 1973.

[1556] Cody interview, supra note 1489.

[1557] This concept, known as "representative bureaucracy" was applied by Thomas Jefferson, although he did so in an effort to increase his party's political power, rather than to insure equality in governmental treatment of minority groups. See Rosenbloom, Federal Service and the Constitution 121, 122 (1971). See also, H. Kranz, Are Merit and Equity Compatible, 5 Pub. Ad. Rev. 434 (September/October 1974).

[1558] Even though EEOC receives relatively fewer charges against employment agencies, it could utilize the Commissioner Charge to initiate investigations of them. Yet, in fiscal year 1973, only one Commissioner Charge was filed against an employment agency, and in that case the agency was charged jointly with a private employer. For a discussion of Commissioner Charges, see pp. 547-49 infra.

Most charges include allegations of more than one form of discrimination. For example, a black female might charge race and sex discrimination in promotion as well as in benefits. In fiscal year 1973, although there were only 48,899 charging parties, there were actually 107,846 charges or allegations filed. Of these charges, 53,732 alleged race discrimination, 33,965 alleged sex discrimination, 12,377 alleged discrimination due to national origin, 2,255 alleged religious discrimination, 1,371 alleged color discrimination and 4,146 charges fell into the category of unspecified or other, where the charging party did not indicate the basis of the discrimination.[1559]

In race discrimination charges, the practices most often complained of were, in order of frequency: discharge; terms and conditions of employment; hiring; promotion; wages; and retaliation. Most of the sex discrimination charges received during fiscal year 1973, alleged in order of frequency: wages; terms and conditions of employment; discharge; promotion; hiring; and job classification.

When a charge is received at an EEOC district office, the charging party is then interviewed to verify the charge as to content and to assure his or her availability and willingness to proceed with the charge. These functions are carried out by the control unit in the office. The control unit also is to conduct a preinvestigation analysis of the charge which includes the determination of the nature of the charge and the basis of the alleged discrimination and the identification of previous charges against the respondent. The unit is to determine if the respondent is a Federal contractor, and, if so, the Federal agency having jurisdiction over it is to be contacted to determine the existence of affirmative action programs and the results of any compliance reviews conducted. If a qualified State or local fair employment practices agency is in the district office's jurisdiction, the charge is at this point deferred.[1560]

[1559] EEOC Computer Printout, supra note 1553.

EEOC's compliance manual prescribes that the entire preinvestigative process, i.e., filing, deferral, referral, or dismissal for lack of jurisdiction, should be completed within one working day of receipt of the charge. Upon completion of the process, according to the manual, the work file should be screened by the supervisor of investigators to determine its adequacy and then assigned to an investigator.[1561] In practice, due to the backlog, charges are usually placed in a pending file at this point to await assignment. It is alleged that as a result of the low skill levels of those assigned the responsibility for pre-investigation analysis charges are not always consolidated, that the number of charges are miscounted,

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1560. EEOC, Compliance Procedures for Compliance Personnel of the Equal Employment Opportunity Commission (May 1973, revised and reissued June 17, 1974) [hereinafter cited as Compliance Procedures].

1561. Id.

and pre-investigative analyses are generally inadequate.[1562]

The supervisor of investigators reviews the pre-investigative analysis for correctness and determines whether the charge will be consolidated with other charges against the respondent and what priority the charge will be given. EEOC's compliance procedures manual states that, in establishing priorities, investigators should consider the following factors: the seriousness of the charge, e.g., the number of employees involved; the size of the respondent's workforce and turnover rate as related to the potential scope of the charge; and the age of the charge. After priorities are established, the charge is assigned to an investigator.[1563]

1562. Interview with John H. Powell, Jr., Chairman, EEOC, Apr. 10, 1974. The staff control unit consists primarily of clerical support staff at GS levels 3 through 7. Chairman Powell has indicated that the skill available at these grade levels are generally insufficient for the task of pre-investigation analysis. The result, according to the Chairman, is that charges are often miscounted or misfiled, making EEOC's compliance statistics, particularly with respect to the backlog, misleading. The Chairman's concerns have been affirmed by the General Accounting Office (GAO). In a report on EEOC, GAO found, among other things, that: in some instances records reflected neither the deferral of charges nor their return to EEOC. For example, 5,186 charges were reported as having been fully investigated, but records did not indicate that they had been assigned to investigators; another 8,422 charges were reported as fully investigated, but records did not indicate that they had been served on the respondent; and 22 of EEOC's 32 district offices had discrepancies of 20 percent or more in their backlog counts with the result that, as of May 1973, the agency's backlog was actually 50,430, rather than 39,837 as EEOC had indicated. J.W. Singer, "Internal Problems Hamper EEOC Anti-bias Efforts," National Journal Reports 1,226 (Aug. 17, 1974). A report prepared by management consultants under contract with EEOC found that charges were generally not consolidated in the preinvestigative stage. Booz-Allen and Hamilton, Inc., supra note 1486, at 47.

1563. Compliance Procedures, supra note 1560, at 20-1. Prior to the issuance of the compliance manual, charges were investigated in the order of their receipt. Interview with William Howard, Supervisory Investigator, Chicago, District Office, EEOC, May 15, 1973, in Chicago, Ill. EEOC's Resource Allocation Strategy calls for specific priorities in the processing of charges. See discussion on pp. 533-37 infra. Former Chairman Powell stated that the Commission would not place priority on any one type of respondent, but would consider: the number of charges against any particular respondent; its compliance history; its position in industry; and the respondent's impact on its competitors and suppliers. Singer article (Aug. 17, 1974), supra note 1562, at 1,229.

The investigator's first step is to locate and interview the charging party. If it appears, at this point, that the facts may be undisputed and only the question of the lawfulness of the practice is at issue, the investigator prepares written interrogatories[1564] to be answered by the respondent. For example, if a female charging party alleges that a respondent refuses to hire her because she is a women, the interrogatories would ask the respondent to affirm or deny the existence of this practice. Barring the existence of a bona fide occupational qualification, verification by the respondent of a practice of not hiring women would, of and by itself, support a finding of reasonable cause.[1565] Thus, the need for further investigation is eliminated.

If the facts are in dispute or the response to the interrogatory does not provide the basis for a determination, the investigator must prepare an investigative plan delineating the steps he or she will take to gather evidence relevant to the charge. Where the charge involves a single charging party against a single respondent, the investigator limits the investigation to those issues raised by the specific charge. Where the charge relates to a respondent against whom other charges are outstanding, the investigator must not only look into the specific allegations of the complaining party but also must look into all like and related issues. An investigation of this nature generally constitutes a review of a firm's total employment practices.

[1564] Interrogatories are questions proposed by EEOC to the respondent. EEOC has no requirement as to the use of interrogatories. In the Chicago District Office, for example, interrogatories are issued in every investigation whereas this is not the practice in all other EEOC district offices. Interview with Donald Muse, Director, Chicago District Office, EEOC, May 15, 1973, in Chicago, Ill.

[1565] EEOC's determinations are based on whether there is reasonable cause to believe that a charge is true. 42 U.S.C. § 2000e-5(b) (Supp. III 1973).

The investigator ascertains the relevant facts by analyzing EEO-1 data, company policies, personnel records, tests, and other data, in addition to interviewing charging parties, supervisors, managers, co-workers, and personnel officers. All of this information is then compiled into an investigative file. Based on an analysis of the investigative file, the investigator prepares an investigator's memorandum, which is a statement of the allegations of the charging party, the respondent's position, and the recommendations of the investigator.[1566]

With the advent of EEOC's litigation centers, the adequacy of EEOC's investigations for litigative purposes is again being significantly questioned.[1567] For the purpose of litigation, attorneys have found the investigative files lacking in factual data.[1568] The reason is that, prior to the 1972 amendments, investigators were required only to gather facts adequate to support or deny a finding of reasonable cause to believe that the charge was true. While this standard still exists in the administrative side of the agency, the standard required by the Office of the General Counsel to prosecute lawsuits successfully is that the facts be adequate to convince the court that the charge is true.

[1566] Compliance Procedures, supra note 1560, at 29-1. EEOC recently informed this Commission that:

> the description of the investigative process outlines only one approach to the investigation of a charge. Many others are utilized by field offices. There are no mandatory investigative approaches or sequences. Letter from Lowell W. Perry, Chairman, EEOC, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, June 6, 1975.

[1567] This problem had been raised by representatives of the Department of Justice in the past. Enforcement Effort report, supra note 1486, at 109, 128. Letter from Senators Williams and Javits, supra note 1522.

[1568] The EEOC Commissioners maintain that, although investigations may be inadequate for litigative purposes, they are adequate for the purpose of making an administrative determination. Walsh et al. interview, supra note 1482.

As a result, regional attorneys have had to return charges to district offices for further investigations.[1569] This, in turn, has created friction between the district offices and litigation centers.[1570]

[1569] Id. and interview with Ronald James, Regional Attorney, EEOC Chicago Region, May 19, 1973, in Chicago, Ill. EEOC recently stated that:

> litigation centers do not return charges for further investigation. They may suggest the type of evidence which would be useful in any future investigation of the same respondent. Perry letter, supra note 1566.

[1570] Former Chairman Powell had stated that he would perhaps direct that regional attorneys oversee investigations of charges slated for litigation. Powell interview, supra note 1510. See pp. 543-47 infra for a discussion of this procedure.

B. Determination

The investigator's memorandum forms the basis for the determination letter. This document is addressed to the respondent and charging party, cites the relevant facts and issues, and states EEOC's determination as to whether there is reasonable cause to believe that the charge is true.

In most of the cases in which it has made a determination, EEOC has found reasonable cause. Between July 1, 1972,and March 31, 1973, the agency had issued 5,083 cause determinations as opposed to 1,869 no cause determinations.

Prior to June 1972, most cause or no cause findings were drafted by the Decisions Division of the Office of Compliance in Washington and passed upon by the Commission. Thus, the entire investigative file had to be sent to Washington, resulting in considerable delay in the compliance process. In June 1972, the Commissioners voted that, in cases where the investigator finds facts analogous to those in cases previously decided by the Commission, the District Director may, on his or her own authority, issue a determination letter consistent with prior Commission decisions. These cases are called Commission Decision Precedent cases. Thus, only those cases which raise novel issues are sent to Washington for decision.[1571]

Since July 1973, most determination letters have been written by investigators in the district office. Even prior to this time, some district offices, in consideration of the pre-investigative backlog, delegated the determination letter writing process to the investigator, and assigned TAWs to investigative functions.[1572]

[1571] Compliance Procedures, supra note 1560, at 40-1.

If it is found that there is no reasonable cause to believe that the charge is true, the charging party is notified in writing of the decision and advised of her or his right to bring a private lawsuit against the respondent and to have counsel appointed by the court. This notification is known as a right to sue letter.

Section 706(f)(1) of the Act also requires EEOC to send right to sue notices to all charging parties whose charges have been pending for more than 180 days without successful conciliation.[1573] EEOC, however, does not follow this procedure.[1574] Right to sue notices are issued only when requested by charging parties. Charging parties, moreover, are not notified that they may request such letters until after conciliation has failed, and then only at the discretion of district directors.

EEOC's rationale for ignoring this statutory time limit may lie in its desire to prosecute the strongest charges through its own legal enforcement arm, the Office of the General Counsel.[1575] In some district offices where right to sue letters have been issued, staff members have found that private attorneys will accept only the best cases, those in which the charging party is most likely to prevail.[1576] The weak, frivolous, or difficult charges are not accepted by private attorneys because they are not likely to result in a favorable judgment and the award of attorney fees.[1577] Under this rationale, if right to sue letters were issued systematically, private attorneys would take all of the "good" cases, leaving EEOC with a large number of cases which it would not be likely to win.[1578]

[1572] See discussion on p. 502 supra.

[1573] 42 U.S.C. § 2000e-5(f)(1) (1970). EEOC recently stated that it does not agree with this interpretation of Section 706(f)(1) and that it now issues right to sue notices automatically upon termination of the compliance process. Perry letter, supra note 1566.

[1574] Under EEOC's Resource Allocation Strategy, discussed on pp. infra, right to sue letters are issued, under certain conditions, to charging parties whose charges have been pending for more than two years.

[1575] Interview with Barbara Schlei, District Counsel, Los Angeles District Office, EEOC, Mar. 28, 1973, in Los Angeles, Cal.

It has been argued, however, that if notices were issued systematically, most charging parties would not bring actions within the statutory period and would thereby lose all of their rights against the respondents. It is also contended that the purpose of EEOC's policy is to protect charging parties.[1579] Once a right to sue notice is sent to a charging party, the law allows that party only 90 days in which to file suit.[1580]

[1576] Id.

[1577] Section 706 permits the court to award attorney fees where the charging party prevails. 42 U.S.C. § 2000e-5(k) (1970).

[1578] Schlei interview, supra note 1575.

[1579] Powell interview, supra note 1510.

[1580] 42 U.S.C. § 2000e-5(f)(1) (1970).

On the other hand, it is clear that Congress added this provision to the Act so that complaints would not languish due to EEOC's inaction. The provision is described in the bill's legislative history as giving individuals the "ability...to sue when the Commission's action is unsatisfactory."[1581] In other words, the right to sue provisions of the amendment were intended to give charging parties a clear alternative to waiting inordinate periods of time for an administrative remedy from EEOC.[1582] By ignoring the provisions, and not at least informing charging parties of their right to request notices, EEOC has effectively denied this alternative to the thousands of individuals whose charges are caught up in its backlog.[1583]

1581. Subcommittee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1862 (1972).

1582. Some EEOC officials argue that charging parties at present have an option: to request a right to sue letter or to wait for final EEOC action. It is also felt that to issue right to sue letters automatically thereby forcing the charging parties to go to court within 90 days or waive their rights of action, precludes the exercise of the option which now exists.

1583. The backlog and its causes are discussed on pp. 529-33 infra.

EEOC could comply with the statutory procedure and still retain the strong cases for its own prosecution. Charges with good litigation potential could be sifted out during the pre-investigative process and given priority for processing through conciliation within the 180-day period. Moreover, the 180-day limitation might provide an incentive for EEOC staff to speed up the processing of all charges.

C. Pre-Determination Settlement

At any point during the investigation of a charge prior to the issuance of a determination letter, district directors or their designees are authorized to enter into negotiations with respondents leading to a pre-determination settlement of the charge. The prerequisites to a pre-determination settlement are: that the respondent has offered to settle; that the investigator has gathered all the relevant facts; that the issues are covered in a Commission Decision Precedent; and that a cause determination letter would probably have resulted if the investigation were completed. The negotiations may be carried on by the investigator, but EEOC's compliance manual advises that cases of a complex nature be handled by conciliators.[1584]

[1584] Compliance Procedures, _supra_ note 1560, at 61-1.

The pre-determination settlement was incorporated into EEOC's procedural regulations in September 1972. In fiscal year 1973, 1,069 predetermination settlements were obtained.[1585] It is possible that the systematic use of the pre-determination letter settlement could provide help in alleviating the backlog. Since negotiations with respondents are not entered into in most cases, however, EEOC has no way of determining how many respondents would be willing to settle prior to determination.[1586]

D. Conciliation

A cause determination results in the assignment of the charge to a conciliator. The conciliator meets with the charging party to re-establish the exact relief sought. On the basis of this information and the case file, the conciliator prepares and sends to the respondent a proposed agreement. If the respondent indicates a willingness to conciliate, a meeting is convened between the respondent and the conciliator.[1587]

The end product of a successful conciliation is a conciliation agreement. Generally, the parties to the agreement are EEOC, the charging party, and the respondent. If, however, the charging party cannot

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1585. Interview with Barry Strejcek, Deputy Chief, Field Operations Unit, EEOC, May 13, 1974.

1586. EEOC indicates, however, that it intends to increase its efforts in this area. Walsh _et al_. interview, _supra_ note 1482. In June 1975 EEOC stated that it recently revised its procedures to encourage greater use of predetermination settlements. Perry letter, _supra_ note 1566.

1587. Compliance Procedures, _supra_ note 1560, at 62-1.

be located, is recalcitrant to conciliation, or EEOC's determination finds no cause with respect to the charging party's charge, but does find other violations of Title VII, the agreement can be entered into without the charging party's signature or approval. Under these circumstances, the conciliation agreement will not contain specific relief for the charging party and the respondent must be so advised.

A typical conciliation agreement contains the following provisions:

> The charging party waives the right to sue the respondent on any of the charges in the complaint.
>
> EEOC agrees that it will not sue the respondent based on any charges in the complaint, or in the case of a respondent State or local government, will not refer to the Attorney General any matters affecting charges in the case.
>
> The respondent does not admit to the charges, but assumes a duty or obligation as to nondiscrimination.
>
> The respondent agrees to abstain from future violations of Title VII.
>
> Remedial actions to which the respondent has agreed, such as back pay, are specifically delineated.
>
> The respondent agrees to adopt an affirmative action plan which is usually included in the agreement and to report annually to EEOC on its progress in meeting the terms of the agreement.

Most conciliation attempts are unsuccessful in that they result in no agreement. Between July 1, 1972, and March 31, 1973, only 533 out of a total of 2,107 attempts resulted in conciliation agreements.[1588] The difficulty in obtaining successful conciliations generally lies in the reluctance of employers to provide remedial relief, such as back pay.[1589] Indications are that this situation may change as EEOC obtains more successful court actions in which back pay is awarded. In fiscal year 1974, as the court enforcement effort gained momentum, 41.7 percent[1590] of the conciliations were successful.

In the case of an unsuccessful conciliation effort, EEOC notifies the respondent that it has terminated the conciliation process. The respondent is given a specified period of time in which to renew conciliation, if desired. The charging party is formally notified of the failure of conciliation after the Litigation Center reviews the file.

1588. Letter from William H. Brown, III, Chairman, EEOC, to Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, Aug. 22, 1973.

1589. Interview with Kenneth Griel, Conciliator, San Francisco District Office, EEOC, Mar. 20, 1973, in San Francisco, Cal.

1590. Powell letter to Buggs, supra note 1550.

If EEOC does not sue, the charging party is then issued the right to sue notice.

In May 1973, the Office of Compliance issued, in its compliance manual, procedures for conducting post conciliation compliance reviews. According to the manual, these reviews are to be conducted if reports required of the respondent are not submitted on a timely basis or do not contain required information. Thus, it would appear that no followup is called for if the appropriate reports are filed, no matter what they disclose. The review consists of contacting the charging party to determine his or her opinion with respect to compliance with the terms of the agreement. From this information, combined with that in the reports, the conciliator makes a determination as to the need for a field visit. The manual does not specify what is to take place on the field visit, but only states that if noncompliance is found, the matter is to be referred to the district director for referral for litigation.[1591]

[1591] Compliance procedures, supra note 1560, at 80-1.

Despite the existence of these procedures, there has been, until recently, little followup on conciliation agreements.[1592] Regional EEOC staff cited the need for additional staff as the reason for lack of monitoring.[1593]

1592. EEOC has stated that "at least 113 compliance reviews were reported by its district offices during Fiscal Year 1973" although data on the number of onsite reviews was "not available." Brown letter, supra note 1588.

Interviews with conciliators in district offices in San Francisco, Los Angeles, Chicago, and Boston, however, uncovered only one instance in which a conciliator had attempted to follow up on an annual report. The conciliator in the Chicago District Office stated that she had done so on her own time and that no action resulted from her review. Interview with Judith Sodini, Conciliator, Chicago District Office, EEOC, May 15, 1973, in Chicago Ill.

Charges received against respondents with conciliation agreements are treated no differently than other charges unless the new charge was filed by the original charging party or by EEOC itself. EEOC stated that it "gives priority to the investigation of such allegations. Such reviews may consist of analysis of written reports of respondents, contact with charging parties, and field investigation." Brown letter, supra note 1588. In some recent conciliation agreements, however, there have been provisions for the submission of future grievances to arbitration. Such a provision was included, for example, in EEOC's agreement with the El Paso Natural Gas Company.

1593. Sodini interview, supra note 1592 and Grie interview, supra note 1589.

In January 1974, 50 conciliation positions were allocated to the district offices to monitor agreements. These conciliators devote 100 percent of their time to monitoring activities, but between January 1974 and September 1974, they completed only 586 reviews. Most of these resulted in findings of noncompliance which have been dealt with by amending the terms of the original conciliation agreements. None of these reviews, however, resulted in the referral of a case to the Office of the General Counsel for noncompliance.[1594]

An effective monitoring system should include a system for reviewing documents, such as personnel files and EEO-1 data, and a capability for conducting onsite inspections. The performance of these responsibilities requires full-time staff.

To determine and assure compliance with any agreement, followup and monitoring are essential. Without the employment of these tools, EEOC has no means, other than the word of the respondent, of determining whether or not the terms of the agreement are being met.[1595] EEOC's lack of a monitoring capability means that the effectiveness of the entire compliance process, in terms of end results, is largely unmeasured. Now that the agency has the power to seek judicial enforcement of Title VII, it is even more crucial that this deficiency be corrected. If it is not, respondents may seek out the conciliation agreement as a means of avoiding compliance, as well as an alternative to being sued.

[1594] Telephone interview with Barry Strejcek, Deputy Chief, Field Operations Unit, EEOC, Mar. 21, 1975.

[1595] An independent study, contracted for by EEOC, concluded that changes in the utilization of minorities by respondents involved in successful conciliation did not differ on the average from those of respondents who have not been involved in EEOC compliance procedures. Five representative companies with which EEOC had signed conciliation agreements in 1967 and 1969 were reviewed to determine the effect of the agreements over a long range period. Generally, it was found that appreciable changes in the respondents' workforce occurred only when the respondents wanted them to. In one of the cases, EEOC's lack of followup resulted in the conciliation agreement being completely forgotten and ignored when a new plant manager, who had not been a party to the negotiations, was hired. Adams, "Toward Fair Employment and the EEOC", prepared for The Center for Human Resource Research, Ohio State University (1972).

E. Charge Backlog

The median period of time required for the resolution of an EEOC charge, from receipt to final disposition, is 32 months.[1596] The process takes so long because of delays caused by EEOC's enormous backlog of charges.[1597] The backlog has increased from 53,410 as of June 30, 1972, to 79,783 as of June 30, 1973, and 98,000 as of June 30, 1974. By March 1975 the backlog had apparently exceeded 100,000.[1598] There are five categories of backlogged charges at EEOC: the preinvestigative analysis backlog, which as of June 30, 1973, consisted of charges for which preinvestigative analyses have not been initiated (10,053); those charges awaiting investigation (57,286); those awaiting pre-determination settlement (401); those awaiting determination (5,881); and conciliation (6,162). EEOC indicates that some progress is being made in keeping the size of the backlog from growing. The agency's former Chairman noted, for example, that for the first time since EEOC began operations in 1965, the number of charges resolved exceeded 51 percent of the charges received.[1599] In fact, as of December 31, 1974, the number of charges resolved in fiscal year 1974 was 83 percent of charges filed.[1600]

[1596] Brown letter, supra note 1588. According to a November 1974 study paid for by EEOC, it takes an average of 30 months to process a charge administratively. Singer article (Mar. 1, 1975), supra note 1486.

[1597] EEOC response, supra note 1486. Former Chairman Powell had stated that he hoped to reduce the median time by one half and stop the backlog increase in 2 years. Powell interview, supra note 1510.

[1598] The Washington Post, supra note 1486. The backlog of charges has been predicted to reach 126,000 by the end of fiscal year 1975. Singer article (Mar. 1, 1975), supra note 1486. EEOC predicts a charge backlog of 110,000. Walsh letter, supra note 1480.

The longest delay occurs between the filing of a charge and the investigation. EEOC reported that 87.1 percent of charges pending as of June 30, 1974 were in the preinvestigation and investigation categories.[1601] A major cause of the backlog is that there are not enough investigators in the district offices to cope with the steadily increasing charge intake. District offices in the Chicago region, for example, received 6,892 new charges during fiscal year 1973. The investigative staff for the region consisted of 38 investigators.[1602] At one time, the Office of Compliance had prescribed 4 investigative completions per month as the standard workload for investigators. The 38 investigators producing at the prescribed rate would complete only 152 investigations per month or 1,824 per year. In practice, the average investigator completed only two investigations per month.[1603] Considering that the Chicago region already had a backlog of 7,086 at the beginning of fiscal year 1973 and that the investigators completed only 788 investigations, it is easy to see how this figure rose to 13,190 by the end of the year, as well as how it will continue to rise unless the investigative completion rate is increased.

[1599] Powell letter to Buggs, supra note 1550. Former Chairman Powell also wrote that the goal for fiscal year 1975 is "zero growth" in the backlog. Id.

[1600] Walsh letter, supra note 1480.

[1601] Letter from John H. Powell, Jr., Chairman, EEOC, to Senators Harrison A. Williams, Jr., and Jacob K. Javits, Oct. 30, 1974. In his letter former Chairman Powell listed five steps being taken to accelerate the investigation of charges filed with EEOC. These steps include: revisions in EEOC's Compliance Manual; the development of a standarized "request for information" device; the formulation of guidelines for the processing of charges; the improvement of EEOC's Pre-Investigation Analysis Unit through training and job reclassification; and the implementation of a coordinated training strategy. Id.

[1602] As of April 1975, 67 investigator positions were allocated to the Chicago region. Walsh letter, supra note 1480.

The four completions standard was the result of a point production system under which investigators were expected to earn 12 points per month, or three points per completion. The system was abandoned at the end of fiscal year 1969, but the completion standard remained. This standard was set when investigators were required to inquire into all "like and related" issues of a respondent's employment practices, even where the charge being investigated raised only a single issue. This process has been abandoned with the adoption of the Resource Allocation Strategy in August 1973 and investigators now

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1603. Interview with Donald Muse, Director, Chicago District Office, EEOC, May 10, 1973.

conduct complete reviews only in specified cases.[1604]

Even with drastic increases in the agency's investigation rate, there is some doubt that the backlog can ever be substantially reduced. As EEOC obtains broad sweeping consent decrees and settlements, there is evidence that the number of charges tends to increase rather than decrease. Since the AT&T settlement,[1605] for example, charges against the corporation and its affiliates have increased by approximately 60 percent.[1606] A similar effect can be expected as EEOC successfully completes lawsuits and obtains voluntary agreements. It is this prospect which gives weight to the position that the agency should concentrate its efforts on attacking broad patterns of systemic discrimination, rather than the hopeless task of eliminating the backlog of individual charges, which are not necessarily the most valid indicators of the existence of discrimination.[1607]

[1604] In the Dallas District Office, for example, investigators have completed as many as 20 investigations per month when not required to look into like and related issues. Interview with Gene Renslow, Director, Dallas District Office, Aug. 30, 1974, in Dallas, Tex. If investigators in the Chicago region attained this rate, they could dispose of 9,000 charges per year which, at the present intake rate, would eliminate the backlog in 6 years.

[1605] See discussion on pp. 549-55 *infra*.

[1606] Interview with Virginia Lauer, AT&T Coordinator, Office of Compliance, EEOC, May 14, 1974.

F. The Resource Allocation Strategy

In August 1973, the Commissioners approved the Resource Allocation Strategy, a plan designed to decrease the backlog. Former Chairman Brown had administratively implemented a somewhat similar system for allocating resources. It was known as the Track Strategy. That concept called for dividing all of EEOC's uninvestigated charges into four categories or tracks. Track 1 would consist of charges against major national respondents, track 2, charges against major regional respondents, track 3, charges against respondents who have a number of charges pending against them, but are not considered major regional respondents, and track 4, consisting of respondents with only one charge pending against them. Track 1 charges from all regions would be consolidated and handled, through investigation and conciliation, by the National Programs Division at headquarters. Track 2 and 3 charges would receive similar treatment in the regions. The investigation of track 4 charges would be limited to those issues raised in the charge in order to expedite their resolution.

1607. Factors such as the proximity of an EEOC district office can affect the number of charges filed in a given locality. A study financed by EEOC, in 19[illegible] for example, found that there was widespread employment discrimination in Puerto Rico, which is under the jurisdiction of the New York District Office. Yet, in fiscal year 1972, EEOC received only six charges from that Commonwealth. Center for Environmental and Consumer Justice, Study to Determine the Extent and Ramifications of Color, Sex and National Origin Discrimination in Private Employment in Puerto Rico (1974).

The Resource Allocation Strategy which is implemented through PMS also consists of strategies for increasing production in the field operation. Originally the first strategy called for allocating 37 percent of field investigative resources to the processing of 200 cases against 200 respondents who had approximately 9,000 charges pending against them, collectively.[1608] This strategy was not successfully implemented.[1609]

The remaining 63 percent of field resources were allocated to the following three strategies. The second strategy was to limit the treatment of cases in which there is only one charge against one respondent to the scope necessary to provide adequate relief for the specific charging party.[1610]

[1608] The allocation of resources is reevaluated and changed for each annual PMS operational plan. In fact, as of April 1975, the Commissioners did not consider the Resource Allocation Strategy to be a separate entity, but merely a part of the set of enforcement objectives contained in PMS. Walsh _et_ _al_. interview, _supra_ note 1482.

[1609] The following 11 companies were selected as respondents for this strategy: International Paper Company; St. Regis Paper Company; International Harvester Company; Firestone Tire and Rubber Company; McDonnell Douglas Corp.; Hughes Tool Company; Brown and Root, Inc.; Westinghouse Electric Corp.; Food Management Corp.; Sperry Rand Corp.; and Rockwell International Corp. The investigative work on these charges was to have been done in the district offices, but, due to lack of coordination, the strategy failed to materialize. Singer article (Aug. 17, 1974), _supra_ note 1512, at 1,228.

The third Resource Allocation Strategy was to perform a thorough analysis of all charges which have been pending for more than 2 years and to close administratively those: for which (1) there is no jurisdiction[1611] (2) the party cannot be located or does not wish to proceed, or (3) the charging party has agreed with a settlement obtained by a State or local deferral agency. Under the fourth strategy, all charging parties who are not covered by the first three strategies and whose charges have been pending for more than 2 years were to be encouraged to request Right-to-Sue-Letters.[1612]

The first strategy was a substitution for tracks 2 and 3 of the Track Strategy, in that it covered major regional respondents and regional respondents with a number of charges against them. The second strategy covered one-on-one cases which were included in track 4. Because the Resource Allocation Strategy dealt with field, and not headquarters, resources, it contained no equivalent to track 1 of the Track Strategy (major national respondents), although the National Programs Division and the Section 707 unit of the Office of the General Counsel are currently processing charges of this nature.[1613]

1610. This means that these charges will be investigated, decided, and conciliated no more broadly than is necessary to deal with the specific charge of the charging party. Thus, like and related issues will not be dealt with. This strategy is based on EEOC's experience that an investigation including like and related issues requires from 5 to 10 times as many hours as one which ignores these issues.

1611. The question of EEOC's jurisdiction over a charge should be determined when it is received in the control unit of the district office.

1612. The Act provides that a charging party should receive a Right-to-Sue Letter after 180 days from the filing of the charge. He or she is then entitled to bring a private suit prior to exhausting EEOC's administrative remedies. See discussion on pp. 520-23 _supra_.

1613. See discussion on pp. 543-47 _infra_.

The success of the fourth Resource Allocation Strategy was contingent upon the ability of regional and district counsels to assure the availability of adequate private legal assistance. Several district offices have large panels of private attorneys. The Los Angeles District Office has the most advanced program with private attorneys (300) capable of assuring adequate legal assistance to charging parties.[1614] Other district offices have had only limited success in locating private attorneys. In some cases, private counsel is difficult to obtain because of a predominantly conservative private bar. In other cases, attorneys have not been actively sought by EEOC.[1615] EEOC plans to improve this situation by developing more panels and by intervening in suits filed by private attorneys who would otherwise be reluctant to take a case.[1616] In addition, EEOC has developed a four point program designed to educate private attorneys in Title VII law and strategy so that Title VII charges not litigated by EEOC's Office of General Counsel can be referred to private attorneys skilled in Title VII.[1617]

In addition, Section 706 of the Act gives United States district courts the authority to appoint counsel for indigent charging parties filing suit under that section.[1618] Thus, in certain cases, such as those involving discharge wherein the charging party may be without income, EEOC's inability to locate counsel would be of little consequence.

[1614] Walsh letter, supra note 1480.

[1615] Schlei interview, supra note 1575.

[1616] Interview with Ronald McNally, Director, Chicago Lawyers Committee for Civil Rights, May 16, 1973, in Chicago, Ill. Mr. McNally indicated that he had offered private counsel from member firms to the Lawyer's Committee to the Chicago District Office, but that his offers were not accepted. See also, letter from Senators Williams and Javits, supra note 1522.

[1617] Powell letter, supra note 1601. The four points contained in this program are: development of panels of private attorneys in each EEOC district office area; preparation of private counsel and law students through training in Title VII law by EEOC funded programs at seven law schools; identification by public and private organizations of attorneys amenable to handling Title VII litigation; and development and distribution by EEOC of appropriate Title VII information to the entire private bar. Id.

According to former Chairman Powell, the Track Strategy is one administrative measure for implementing the Resource Allocation Strategy.[1619] He regarded the Track Strategy as a "legacy" from former Chairman Brown which might not be the best way of allocating resources.[1620] As a result, as of April 1974, he was looking into other ways of implementing the Resource Allocation Strategy.

One such measure, which was being considered as of May 1974, is advance arbitration. Under this system, an aggrieved employee would have the choice of either filing a charge under EEOC's administrative procedure or submitting the matter to an arbitrator, as in collective bargaining. This procedure would require that EEOC approve the arbitrator and that the employee not be barred from seeking judicial relief if the results of arbitration were unsatisfactory.[1621] Since the resignation of former Chairman Powell, the Commissioners have given no further consideration to advance arbitration because they feel that the measure would not fully protect charging parties.[1622]

G. Litigation

If the respondent is unwilling to enter into an agreement acceptable to EEOC and to the charging party, it has been EEOC's practice to have the case file forwarded to the Regional Litigation Center.[1623] The charges on which the Litigation Centers decide to file suit must be approved by the Commissioners. Toward this end, the cases are sent to the General Counsel's Office at headquarters which submits the Litigation Centers' justification memorandum to the Commissioners. The Commissioners then vote on whether to authorize litigation. In deciding whether a suit is warranted, the Commissioners consider the soundness of the basis for the original determination of reasonable cause and whether the administrative remedies have been exhausted, i.e., whether EEOC has made a good faith effort at conciliation. After the case has been approved for suit by the Commissioners it is returned to the Litigation Center, which then prepares and files suit.[1624]

[1618] 42 U.S.C. 2000e-5(f)(1)(1970).

[1619] Powell interview, supra note 1478.

[1620] Id.

[1621] In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court held that, where a black employee submitted a claim of discrimination to arbitration, the results thereof did not preclude him from seeking further relief in the courts, and that the court need not defer to the findings of the arbitrator.

[1622] Walsh et al. interview, supra note 1482.

[1623] Compliance procedures, supra note 1560, at 82-1.

Prior to filing of the suit, the respondent is given an opportunity to settle out of court. A presuit letter and a copy of the complaint are sent to the potential defendant indicating that EEOC intends to file suit on the complaint at the expiration of 20 days unless the employer agrees to negotiate a settlement.[1625] It could be argued that the practice of attempting to negotiate presuit settlements is duplicative of the conciliation process. Some have contended that the 1972 amendments to the Act merely superimposed the Office of the General Counsel on the existing administrative structure.[1626] The integration of the conciliation process into presuit settlement would increase the immediacy of the threat of an EEOC suit and provide respondents with more incentive to enter into conciliation agreements.

[1624] Carey interview, supra note 1515. An out of court settlement would be advantageous to a respondent in that he or she would be spared the expense, time, and bad publicity associated with litigation.

[1625] Presuit settlement attempts have also proved to be time consuming. According to an independent management report, these negotiations have taken as much as a year in some cases. Booz-Allen and Hamilton, Inc., supra note 1486 at 41.

[1626] See Singer article (Aug. 17, 1974), supra note 1562, at 1,234.

As of March 31, 1975, EEOC had filed 290 lawsuits,[1627] 60 interventions, and 18 preliminary injunctions, 84 lawsuits were filed in fiscal year 1974, as compared to 110 in fiscal year 1973 and four in fiscal year 1972. During the period in fiscal year 1975 from July 1, 1974, to March 31, 1975, a total of 90 suits were filed. The attached chart indicates the breakdown of the allegations in the first 100 cases as to race, sex, religion, or national origin and as to type of respondent.[1628] An analysis of 90 representative pending cases provided by EEOC revealed that the most common issues in cases based on race discrimination were terms and conditions of employment, hiring practices (including testing and education requirements), placement (segregated job classifications), and promotions. Sex discrimination suits most frequently concerned segregated job classifications, wages, terms and conditions of employment (such as limitation of overtime), and promotions.[1629]

The Office of the General Counsel appears to have been extremely selective in filing suits.[1630] As of June 1973, 15 months after the agency was given the power to bring suit, 1,319 unconciliated cases had been referred by the district offices to the litigation centers, but only 124 cases had been approved for suit and only 81 lawsuits had actually been filed.

[1627] At one point the General Counsel's office planned to file 600 lawsuits in fiscal year 1974. Singer article, (Aug. 17, 1974), supra note 1562, at 1,232. EEOC estimated that it would file at least 225 cases in fiscal year 1975. Powell letter, supra note 1550.

[1628] See attached chart on p. 540 infra.

[1629] Analysis of pending lawsuits prepared by Litigation Services Branch, Office of the General Counsel, EEOC (undated).

[1630] By the end of fiscal year 1972, EEOC had filed only five lawsuits. While the number of suits had increased drastically by March 1974, it is still unimpressive in view of the potential workload. EEOC's General Counsel attributes the low number of suits in part to the "unsuitability" of 80 to 90 percent of the cases referred from the district offices. A second reason provided was the administrative problems of the General Counsel's Office itself. Singer article (Aug. 17, 1974), supra note 1562 at 1,226. Also, see the discussion of this point on p. 502 supra. EEOC has listed in order of importance, the following reasons why cases referred to the Office of General Counsel were not selected for litigation: lack of evidence; lack of appreciable impact; no cause on alleged issue; suit already filed by private charging party or Department of Justice; issues rendered moot by subsequent events' no class issues; problems with conciliation; no conciliation effort and other charges shown to be more suitable. Powell letter, supra note 1601.

First 100 Lawsuits Filed by EEOC

Allegations of Discrimination (some cases allege more than one kind of discrimination).

Litigation Centers	Atlanta	Philadelphia	Chicago	Denver	San Francisco
Race	35	22	18	13	93
Sex	6	17	21	4	56
Religion	2	1	1	1	14
Nat'l Origin	0	5	3	2	0
Types of Respondents					
Private Employers	**39**	**26**	**30**	**12**	**10**
Unions	**5**	**10**	**8**	**2**	**6**
Employment Agencies	**0**	**1**	**0**	**0**	**0**
Joint Apprenticeship Committees	**0**	**1**	**1**	**1**	**1**

Source: Litigation Services Branch, Office of the General Counsel, EEOC (undated).

The low number of suits filed is probably also due to the fact that litigation centers were slow to hire staff. As of April 30, 1973, for example, only 175 of the 270 positions authorized for the litigation centers had been filled. No litigation center was fully staffed. The average number of personnel on board was only 35 out of 54 authorized positions.[1631] Further, attorneys have not carried full caseloads. As of March 1974 for example, an average of one case was assigned to each attorney, although the fiscal year 1975 budget projected five cases per lawyer.[1632]

While a representative number of EEOC lawsuits alleged race and sex discrimination, few were concerned with discrimination based on national origin. Although a significant number of the charges filed with EEOC allege national origin discrimination, disproportionately fewer of these charges resulted in lawsuits than those filed by other groups.[1633]

As of August 1974 more than 40 percent of EEOC's lawsuits were against respondents having workforces of between 25 and 300 persons. Approximately 20 percent of the respondents have between 300 and 1,000 employees, 30 percent between 1,000 and 10,000 employees, and four percent over 10,000.[1634]

Thus, EEOC apparently has not concentrated its efforts on the larger respondents.[1635] One result of this policy has been to reduce the impact of

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1631. Brown letter, supra note 1588.

1632. Booz-Allen and Hamilton, Inc., supra note 1486, at 42.

1633. See chart on p. 540 supra.

1634. Analysis of EEOC lawsuits supplied by Litigation Services Branch, Office of the General Counsel, EEOC, Aug. 1974.

1635. EEOC recently informed this Commission that effort to reach national respondents are underway using Section 707. Walsh letter, supra note 1480. It can be argued that to concentrate on large scale cases would require a disproportionate amount of staff resources. Further, considering the relative lack of experience of EEOC staff in prosecuting Title VII suits, a logical first step would be for them to develop expertise in handling less complex cases before attempting broad, multifaceted lawsuits.

the litigation program in that it has not systematically reached industry leaders. Such cases might well have brought about voluntary compliance by other employers in the same industry. A major reason for this problem is that regional attorneys, having been given no criteria for the selection of cases for suit,[1636] have applied their own criteria, possibly concentrating on cases that they personally believe are "winable."

In addition, little emphasis has been placed on singe charge cases.[1637] Most of the single charging party or single issue cases are returned to the district offices from which they were referred, leaving the charging parties with no alternative but to file suit through a private attorney.[1638] The charging party's position has changed, however, because considerable time has passed since the discrimination occurred,[1639] and witnesses and evidence may have long since disappeared, making a private suit even more difficult. Moreover, the charging party has exposed himself or herself to the inevitable consequences, however subtle, of filing a charge against one's employer. Thus, for the individual filing a one-on-one charge, this means that, after having waited several years[1640] for the charge to be process through the conciliation stage, she or he is left in a worse position than when the charge was initially filed. For these individuals, EEOC is still essentially a conciliation agency.

[1636] James interview, supra note 1569. Mr. William Robinson, Chief, Trial Litigation Division, EEOC in an interview conducted on April 19, 1974, stated that, generally, the professional training and ability of regional attorneys provides them with a basis for selecting good litigation vehicles. In exercising his or her professional judgment, the attorney would consider such factors as: whether a good faith effort at conciliation had been made; whether all issues in the case were subject to a cause finding; and whether there was a well founded cause finding.

[1637] An analysis of EEOC's lawsuits filed as of May 1974, indicated that only three cases involved a single charging party, analysis of EEOC lawsuits, supra note 1634. EEOC officials contend, however, that it is not the policy of the Office of the General Counsel to reject a charge merely because of a lawsuit would affect only a small number of charging parties. Robinson interview, supra note 1636.

[1638] Carey interview, supra note 1515.

[1639] See discussion on p. 529 supra.

[1640] Id.

H. Section 707 Suits

On March 23, 1974, the power to file suits against all respondents, with the exception of State and local governments, alleging a pattern or practice of discrimination under Section 707 of the Act became exclusively that of EEOC. Since the enactment of the 1972 amendments the agency had had concurrent jurisdiction with the Department of Justice to bring this type of suit.[1641] This jurisdiction, however, was never exercised.[1642]

Why the Office of the General Counsel did not exercise its concurrent jurisdiction is not readily apparent, especially in light of the fact that it knew that EEOC probably would have sole responsibility for Section 707 actions as of April 1974. EEOC attorneys could have gained substantial experience in prosecuting these cases, which are, by definition, significantly broader in scope than Section 706 suits. Additionally, the organizational mechanism for handling pattern or practice cases could have been set up and operating well in advance of the transfer of jurisdiction. As of May 1974, however, EEOC had neither this mechanism nor any experience in Section 707 litigation. As a result, it may take EEOC attorneys a considerable length of time to develop the expertise in handling Section 707 suits that the Department of Justice had attained through its experience.[1643]

[1641] 42 U.S.C. § 2000e-6(e) (1972). See discussion in note 1465 supra.

[1642] See discussion on p. 503 supra.

In mid-1974, EEOC created a special unit within the Office of the General Counsel to process Section 707 charges.[1644] Such charges will be initiated by a Commissioner Charge and investigated and conciliated by personnel from the Office of General Counsel.

[1643] According to the Chief of the Employment Section of the Civil Rights Division (CRD) of the Department of Justice, it takes at least three years to develop an effective litigation unit. Memorandum from David Rose, Chief, Employment Section, CRD, Department of Justice, to J. Stanley Pottinger, Assistant Attorney General, CRD, Department of Justice, Jan. 18, 1974.

From April 1974 through July 1974 DOJ assigned eight staff attorneys to assist EEOC in assuming total responsibility for Section 707 suits. EEOC, however, made little use of this assistance. The DOJ unit was housed in separate facilities and had little contact with EEOC attorneys. During this period, EEOC maintained two separate Section 707 units, one composed of DOJ attorneys and the other of EEOC lawyers. For a further discussion of this unit see U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort--1974 Vol. 7* (in print).

EEOC's former General Counsel has indicated that he intended to initiate 40 Section 707 actions in fiscal year 1975. In so doing he intended to utilize 60 percent of the Office's headquarters staff and 12 percent of the field staff. Singer article (Aug. 17, 1974), *supra* note 1512, at 1,234. See also Powell letter, *supra* note 1601. As of March 1975, however, only 1 section 707 action had been filed.

[1644] Powell interview, *supra* note 1478. During fiscal year 1975 EEOC experimented with a selective case referral approach. Those matters identified as potential Section 707 cases were to be handled by either joint litigation compliance teams working closely wtih assigned attorneys from the Office of General Counsel. Powell letter, *supra* note 1601. In April 1975, EEOC issued procedural regulations under which Section 707 cases will be initiated by Commissioner charge. The Office of the General Counsel will be responsible for investigating and attempting conciliation of these cases. 29 C.F.R. Pt 1601.

Thus, it is felt that this unit will be serving essentially the same function as the National Programs Division and may supplant it.[1645] There is, however, a clear potential difference between the roles of the two units. The pattern or practice investigations of the new unit may be aimed at single facilities or groups of facilities in one geographic area, whereas the National Programs Division focuses on the total activities of major national respondents.

The justification for substituting this unit for the National Programs Division, according to former Chairman Powell, is that the investigation of the charges will be performed by the same staff who will ultimately prosecute the lawsuits.[1646] Therefore, the investigation can be geared toward developing evidence suitable for litigation.[1647] This point appears to have some validity, especially in view of EEOC's past experience with investigations conducted by district offices.[1648] However, while EEOC district offices have not investigated complaints with a view toward litigation, or worked closely with the Office of General Counsel, this is not true of the National Programs Division. That Division has been investigating matters with litigation in mind and its procedural guidelines call for close coordination with the Office of General

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[1645] Powell interview, supra note 1478.

[1646] Id.

[1647] Id.

[1648] See discussion on pp. 516-517 supra.

Counsel at all stages of the process.[1649] In fact, two attorneys from the latter Office, for example, are assigned to each of the units handling a major respondent.

In any case, it is important that, if the National Programs Division is to be eliminated, all of its functions and powers be maintained by the new unit. The National Programs Division is currently EEOC's most effective tool in combating systemic discrimination. Further, its position on the administrative side of the agency gives strength and stature to the administrative compliance process. It would be indeed unfortunate if the priority given to its functions in the past was in any way reduced. One method of ensuring that progress could be maintained would be to continue the National Programs Division until the new unit is staffed and operational. The transfer of responsibilities would thus be gradual. This task oriented unit is a promising alternative to the bureaucratic administrative process and should not be disturbed unless all of its functions are retained.[1650]

Further, there are a number of areas which deserve increased emphasis by EEOC. State and local governments are the fastest growing industry in the Nation, yet EEOC has given no priority to processing charges against them. Common practices, such as the use of discriminatory tests, could be attacked nationally by EEOC. Moreover, there is a need for precedents to be established in the complex area of public employment. The logical unit to

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1649. In addition, if the Office of the General Counsel investigates and conciliates charges and also prepares decisions for approval by the Commissioners, there might be some conflict with the Administrative Procedures Act, (5 U.S.C. § 500 /1966/), which requires the separation of decisional and prosecutorial functions.

1650. See Bloomrosen, The Crossroads for Equal Employment Opportunity. . 49 Notre Dame Law. 46, 50 (Oct. 1973).

provide leadership on this subject would be the National Programs Division.[1651] Similarly, this Division could concentrate on institutions of higher education.

I. Commissioner Charges

Through the use of the Commissioner Charge, EEOC can institute an investigation without having to wait for a charge from an aggrieved party. Section 706(a)[1652] of the Act empowers each Commissioner to file charges where he or she believes unlawful discrimination has occurred. This process gives the agency the ability to enforce the Act where, for any number of reasons, such as fear of retaliation or ignorance of the law, aggrieved persons have not filed charges.

A novel and important use of the Commissioner Charge was to initiate investigations by the National Programs Division of four major national corporations and one important national union by former Chairman Brown.[1653] The use of this procedure assured that all issues of discrimination would be covered, regardless of whether they were raised by individual charges. In addition, the use of Commissioner Charges eliminated the need for consolidating outstanding charges against these respondents.

Used in combination with EEOC's enforcement powers under the 1972 amendments, the Commissioner Charge is a potentially powerful tool. It gives the agency full stature as an enforcement agency in that it can select its own targets for investigation. The Commissioners, however, have made only sporadic use of the Commissioner Charge. In fiscal year 1974, 80 Commissioner Charges were filed, as compared

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1651. Since EEOC does not have the authority to file suit against such institutions (42 U.S.C. § 2000e-5 [f] [1] [1972]) there is no compelling reason why investigations pertaining to them should be assigned to the Office of General Counsel.

1652. 42 U.S.C. § 2000e-5(b).

1653. In August 1973, Chairman Brown issued Commissioner Charges against Sears and Roebuck, General Electric, General Motors, Ford, and the International Brotherhood of Electrical Workers. New York Times, Feb. 12, 1974, at 36, col. 1. As of March 1975 these charges were being investigated by the National Programs Division. Commissioner charges are also being used against classes of respondents other than major national respondents. Commissioners use their right to file charges under a variety of circumstances. Walsh letter supra note 1480. For a discussion of circumstances in which Commissioners charges are used, see p. 548 infra.

to 38 in fiscal year 1973 and 197 in fiscal year 1972.[1654] Of the charges in fiscal year 1973 just seven were filed at the initiation of Commissioners.[1655] Two of the Commissioner Charges filed in fiscal year 1974 alleged patterns or practices of discrimination under section 707 of the Act and by March 1975, the number of such charges had risen to 20.[1656]

Generally, Commissioners Charges are issued upon the recommendation of EEOC field or headquarters staff. A Commissioner Charge is processed in the same manner as a normal EEOC charging, unless the charging Commissioner requests that it be given priority or the deferral agency waives its processing time. In the case of a charge proposed by a district director, the proposal is sent to the Office of Compliance. After reviewing the proposed charge, the Office forwards it to the Office of the General Counsel for approval. The General Counsel's approval results in a recommendation for signature by the Director of Compliance to the Commissioners.

[1654] EEOC recently indicated that citing the number of Commissioner Charges filed is not revealing because the breadth of a Commissioner Charge is usually far wider than a non-Commissioner Charge. Walsh letter, *supra* note 1480.

[1655] Twenty-four were filed to protect the anonymity of the real charging party. Of the remaining seven, three were filed as a result of a hearing conducted in fiscal year 1972, two upon another Federal agency's recommendation, one because a respondent in a single charging party case failed to resolve issues for others in the affected class, and one based on the recommendation of the General Counsel to clarify a jurisdictional matter. Brown letter, *supra* note 1588. Another use of a Commissioner Charge has been where an aggrieved person has withdrawn his or her charge. By virtue of EEOC procedural regulations /29 C.F.R. § 1601.10 (1972)/, a charging party may withdraw the charge only with the consent of the Commission. In field offices, district directors must approve withdrawals.

[1656] Former Chairman Powell stated that he intended to use the Commissioner Charge to initiate cases slated for suit under Section 707. Powell interview, *supra* note 1478.

Another mechanism that resulted in the filing of Commissioner Charges was the Commission hearing. The hearings were held to focus attention on patterns of discrimination in various industries. For example, the petro-chemical, aerospace, financial white collar, textile, and electric and gas utilities industries were subject to agency scrutiny at hearings.[1657] Nevertheless, this useful tool was totally abandoned by EEOC in fiscal years 1974, 1974, and most of 1975.[1658]

J. Consent Decrees

1. The AT&T Settlement

On January 18, 1973, the American Telephone and Telegraph Company (AT&T) and its 24 subsidiary operating companies[1659] entered into a landmark agreement with EEOC, the Department of Justice, and the Department of Labor. The agreement is important not only because one of the Nation's largest employers is a party to it, but also because it contains the first extensive back pay settlement obtained on account of past discrimination, and it covered [illegible] of the classes of employees affected by the discrimination.

[1657] The hearing concerning the petro-chemical industry was held in Houston, Texas in June 1970; the aerospace industry hearing was held in Los Angeles, California in March 1969; the white collar hearing was held in Los Angeles, California in January 1968; the textile industry hearing was held in Charlotte, North Carolina in January 1967; and the hearing on the electric and gas utilities was held in Washington, D.C. in November 1971.

[1658] Although hearings have great potential both as a tool to educate the public and to bring about broad industry changes, they were not used as effectively as possible by EEOC in the past. See Enforcement Effort report, supra note 1486 at 115-17.

EEOC has recently informed this Commission that "since enforcement power was granted to us by Congress this agency is of the opinion that greater results can be achieved with less expenditure of resources by use of our enforcement authority rather than public hearings."

[1659] These subsidiary companies, such as New Jersey Bell Telephone Company, constitute the Bell System. At the end of 1970, the Bell Systems employed 732,450 individuals.

On December 10, 1970, EEOC intervened before the Federal Communications Commission (FCC) to prevent a rate increase sought by AT&T. EEOC based its action generally on the contention that the company's allegedly discriminatory employment policies violated its public interest obligations, as well as Federal, State, and constitutional provisions, and specifically on the the grounds that the company's expenses were inflated due to the high turnover rate and other factors caused by these discriminatory employment practices. FCC responded by holding proceedings to consider the question of employment discrimination and to determine the effect of this discrimination on the revenues, practices, and rates of AT&T.[1660] An EEOC task force working under the general supervision of the Chairman gathered extensive evidence supporting the existence of widespread patterns and practices of employment discrimination in the Bell System, and issued a report entitled Unique Competence.[1661]

At the same time, AT&T was going through its normal compliance review with the General Services Administration (GSA). GSA is the compliance agency for AT&T as a government contractor under Executive Order 11246. GSA approved AT&T's previously submitted affirmative action plan on September 19, 1972. EEOC objected strenously to the plan on the grounds that it failed to identify the affected class of people discriminated against and contained no provision for back pay or promotional increases. Additionally, the Office of Federal Contract Compliance (OFCC) found that the plan did not meet the requirements of Revised Order No. 4, its directive which sets forth the minimum components of an affirmative action plan. OFCC, therefore, exercised its prerogative to revoke GSA's jurisdiction over AT&T and to deal directly with the company.

[1660] See discussion in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. 1, To Regulate in the Public Interest 57-62 (November 1974).

[1661] EEOC, Unique Competence (Dec. 1, 1971). This report documents that 60 percent of AT&T's employees were women, but they constituted almost 100 percent of the company's secretaries, operators, and service representatives and only one percent of the craft workers and operatives. While women accounted for 41 percent of the company's managers, they were concentrated (94 percent) in the first levels. Similarly, the report indicates that minorities comprise approximately 12 percent of the AT&T work force, but only seven percent of the skilled craft jobs and even fewer management positions. The data compiled by the task force consumed 5,000 pages with 25,000 pages of back up documentation. The total cost to EEOC in terms of personpower and time was approximately 13.5 person-years. Interview with David Copus, Deputy Chief, National Program Division, EEOC, July 13, 1973.

Extensive negotiations between AT&T and the government, represented by EEOC and the Department of Labor,[1662] resulted in an agreement in the form of a consent decree entered in the United States District Court, Eastern District of Pennsylvania.[1663] The consent decree, to which EEOC, the Departments of Justice and Labor, and AT&T are parties, contains extensive affirmative and remedial relief for affected classes. The terms of the agreement apply not only to AT&T, but also to the entire Bell System. It provides for the acceptance by OFCC of AT&T's model affirmative action program, upgrading and transfer plan, and job briefs and qualifications. The most significant aspect of the agreement, however, is the remedial relief or back pay which it provides for employees who had been denied equal employment opportunity in the past. The agreement includes approximately $50,000 in back pay for female college graduates who had been kept out of the advancement training programs. An additional $500,000 is provided for "switchroom" helpers who had been denied advancement. The largest sum is allocated to 3,000 women in craft jobs who will receive up to $10,000 each. Another unique provision of the agreement is for delayed restitution or wage adjustments for minorities and women who never sought promotions because they were aware of the company's discriminatory practices.[1664] Back pay and wage adjustments were originally expected to total approximately $38 million, but as of February 1974 this figure had risen to $50 million as a result of underestimates as to the number of employees covered by the agreement and the number making claims under it. In May 1974, AT&T, EEOC, and the Departments of Justice and Labor entered into another agreement based on Federal claims that the company failed to pay equal wages to management men and women employees doing jobs requiring the same skill, effort, and responsibility. AT&T agreed to pay $7 million in back pay and $23 million in wage adjustments and to take affirmative steps to equalize pay and duties in the future.

[1662] OFCC, an office of the Department of Labor, was represented in the negotiations by the Department's legal arm, the Office of the Solicitor.

[1663] Civil Action No. 73-149, Jan. 18, 1973 (1 CCH Employ. Prac. Guide ¶ 1860).

[1664] Id.

The company's affirmative action plan provides goals and timetables for the hiring of men in non-traditional jobs, as well as for minorities and women. In a good faith effort to meet such goals, each Bell company is required to establish intermediate targets for one, two, and three year periods. At these times, the company must reevaluate the goals to determine whether underutilization still exists, and adjust them accordingly. This procedure permits the re-adjustment of goals to allow for employee turnover.[1665]

While the terms of the agreement are generally laudable,[1666] the provisions for monitoring the followup appear inadequate. There is no indication in the document as to who is responsible for conducting onsite followup reviews of AT&T compliance. Normally, this would be the responsibility of GSA which is the compliance agency for the communications industry. In fact, monitoring of AT&T accounted for approximately 40 percent of GSA's compliance resources. Despite the continued existence of these resources, OFCC has yet to direct GSA to resume its monitoring of the company. OFCC itself is insufficiently staffed to conduct reviews and EEOC has only recently developed the capability for reviewing its conciliation agreements. Nevertheless, EEOC has found itself carrying the brunt of the followup activity.[1667]

[1665] Id.

[1666] Women's rights and minority interest groups generally agreed that, while the agreement was a definite step forward, the amount of back pay awarded was too low. The National Organization for Women, for example, maintained that $4 billion rather than $15 million was the amount owed to female Bell employees in back pay. Ann Scott, Vice President, National Organization for Women, Press Release, Jan. 18, 1973.

The result is that monitoring of the agreement has been limited. AT&T is required to file reports with EEOC and OFCC annually. These reports should indicate the projected number of job opportunities by the major job titles (e.g., installer, lineman) for the calendar year and the number of jobs filled during the previous quarter by net credited service data, date of transfer, job title, minority designation, sex, and last previous job assignment. While this kind of information would indicate compliance or noncompliance, it is no substitute for systematic onsite reviews.[1668] Although EEOC has undertaken major review activity it does not have the capacity to monitor the agreement on a full-time basis.[1669]

[1667] Telephone interview with David Copus, Deputy Chief, National Programs Division, EEOC, Mar. 18, 1975.

[1668] Copies of these reports are also distributed to all employees. It could be argued that this practice constitutes a form of monitoring. The reports served as the basis for on-site reviews. Walsh letter, supra note 1480.

An ad hoc group, the AT&T Government Coordinating Committee, which includes representatives of EEOC, OFCC, and the Department of Justice, has been formed to monitor reports and compliance in general with the agreement. In May 1974, the Committee initiated reviews of compliance with the January 1973 decree. As a result of these reviews, which continued through October 1974, widespread violations of the agreement were uncovered. Some Bell system companies, for example, had not kept records of the race and sex of employees seeking transfers or promotions and thus were unable to determine if objectives set in the agreement were being met. In many instances outright violations of the decree, such as passing over qualified minorities for promotions and failing to attempt to recruit women for outside craft jobs, were found.[1670] As of March 1974, the Committee members were in the process of negotiating a supplemental consent decree under which the Bell companies would agree to take steps to remedy these violations.[1671]

Still, the AT&T agreement represents a significant step in the attack on systemic discrimination. Its effect, however, may be lessened unless prompt steps are taken to provide for more systematic monitoring and review of the employers it covers.

1669. EEOC had one full-time National Coordinator and 31 field investigative person years devoted to monitoring the agreement, but lacked an adequate information system for a proper evaluation of the AT&T settlement. Letter from Senators Williams and Javits, _supra_ note 1522. EEOC recently wrote that:

> the 31 field work years were used to investigate and conciliate pending charges under expedited procedures, and only secondarily to monitor the AT&T decrees. Perry letter, _supra_ note 1566.

1670. Copus interview, _supra_ note 1667.

1671. _Id._

2. The Steel Industry Settlement

On April 15, 1974, EEOC and the Departments of Labor and Justice filed two consent decrees in the U.S. District Court in Birmingham, Alabama, with nine major steel companies and the United Steelworkers of America.[1672] These nine companies produce approximately 73 percent of the country's steel and employ 347,679 workers of whom 52,545 are black, 7,646 are Spanish surnamed, and 10,175 are women.[1673] The Federal agencies maintained that women and minorities in the industry were systematically assigned to lower paying jobs with little opportunity for advancement, denied training opportunities, and judged by more stringent qualification criteria than were white males.

The most significant aspect of the agreement is the substantial back pay settlement. It calls for almost $31 million to be paid to 34,449 black and Spanish surnamed male employees who were hired for production and maintenance jobs before 1968, to 5,559 women employees in those jobs now, and to minority and women employees who retired from those jobs during the past two years.[1674] While the overall back pay figure appears to be appreciable, it is difficult to gauge the actual amounts due minority workers because the government conducted no broad scale investigations of the industry's prior employment practices. Some critics of the agreement have contended that the maximum individual back pay award of $1,000 does not come close to compensating minority employees, many of whom have been employed 20 or more years, for the effects of past discrimination.[1675] Further, the majority of the affected workers will receive only the minimum payment of $250.[1676] The agreement establishes an Audit and Review Committee composed of five company members, five union members, and one government representative. One of the functions of this Committee is to determine the amount of individual payments under the agreement. The Committee also has the authority to direct the individual companies to establish implementing committees. These committees would perform such functions as reviewing progress toward meeting goals and timetables.[1677]

[1672] Civil Action No. 74-P-339. Companies named in the suit and signers of the consent decrees were Allegheny-Ludlum Industries, Inc., Armco Steel Corporation, Bethlehem Steel Corporation, Jones & Laughlin Steel Corporation, National Steel Corporation, Republic Steel Corporation, United States Steel Corporation, Wheeling-Pittsburgh Steel Corporation, and Youngstown Sheet & Tube Company.

[1673] Department of Justice, Press Release, Apr. 15, 1974.

[1674] Steel industry consent decree, supra note 1672.

[1675] Address by Herbert Hill, National Labor Director, National Association for the Advancement of Colored People, New Orleans, Louisiana, July 2, 1974.

[1676] Id.

[1677] Steel industry consent decree, supra note 1672.

The consent decrees establish goals and timetables calling for the hiring of women for twenty percent of all vacancies in clerical and technical jobs, and the selection of minority and women employees for twenty-five percent of the vacancies in supervisory jobs or for management training. The agreement permits employees to transfer to other jobs on a plant-wide basis and maintain their previous salaries regardless of the salary of the new position. Seniority, for purposes of promotion, demotion, layoff, and recall, according to the agreement, is determined by the length of service at each plant, rather than in a specific unit or department of the plant.[1678]

Reaction to the agreement from concerned interest groups was generally unfavorable. The National Organization of Women (NOW) criticized the agreement on the grounds that the amount of back pay was insufficient; the government is required to intervene in private suits on behalf of the industry; and the absence of any provision for women to move from technical and clerical jobs into higher paying craft jobs.[1679] Similarly, the National Association for the Advancement of Colored People was critical of the agreement because: the affected classes of employees were excluded from the negotiations; employees are required to waive their right to bring suit; the government is required to intervene for industry in private suits; the back pay settlement is inadequate; and the agreement fails to merge or restructure seniority lines.[1680] Much of the concern over the agreement centers around a provision which provides that the companies signatory to the agreement are deemed, by virtue of it, to be in compliance with Title VII and Executive Order 11246. Further, the decree states that, if an employee brings a private suit, for other than back pay, the plaintiffs will undertake to advise the court that such relief is unwarranted. This means that if an employee elected to bring a private suit, he or she would face a range of formidable adversaries including not only the steel company and unions, but also EEOC, the Department of Justice, and the Department of Labor.[1681]

[1678] Id.

[1679] Ann Scott, Vice President, National Organization for Women, Press Release, Apr. 15, 1974.

In any event, the steel industry decree contains a major back pay settlement and affects thousands of minority and female workers. To obtain this kind of relief for so many persons would have been substantially more expensive to EEOC if done on a charge by charge basis. Further, the difficulty of the task of obtaining the agreement was exacerbated by the complexity of the steel industry's seniority system. However, while the provision granting immunity from suit by the government is standard in this type of agreement, the requirement that the government appear on

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1680. Herbert Hill, National Labor Director, National Association for the Advancement of Colored People (NAACP), Press Release, Apr. 1974. NOW, the National Ad Hoc Committee of Steelworkers and the National Steelworkers Rank and File Committee petitioned the court to be allowed to intervene in the case in an attempt to set aside parts of the decree. A limited right of intervention was granted to them in May 1974, but on June 8, 1974 their petitions were denied.

1681. Chairman Powell has stated that he views EEOC's responsibility in this respect as being limited to informing the court of the existence of the agreement and that he does not favor the inclusion of such a provision in future negotiated agreements. Powell interview, supra note 1478.

behalf of the industry in private actions is unusual.[1682] The inclusion of this provision in future agreements could result in an unfortunate alliance between Government agencies responsible for enforcing anti-discrimination laws and corporate interests which violate them.[1683]

Further, one of the best ways of assuring that the rights of affected classes of employees are protected would be to include representatives of these employees in the negotiations precedent to future agreements. At minimum, minority and women's interest groups should be afforded the opportunity to criticize and provide input on settlement agreements prior to their execution rather than afterwards. In addition, although not done in this instance, future agreements must be preceded by thorough investigations of all of the employers' installations. It is difficult to see how an effective agreement can be reached unless the Government has specific knowledge and data on the extent of the discriminatory practices.

V. Deferral of Charges to State and Local Agencies

EEOC is required, under Section 706 of the Act, to defer charges it receives to qualified State and local fair employment practices agencies having jurisdiction over the respondents. The agencies are allowed 60 days to resolve the charges before EEOC resumes its jurisdiction.[1684] In order to receive deferred charges, an agency must apply to EEOC for designation as a formal 706 agency.[1685] This status also permits EEPC to accord authority to the agency's findings and orders.

[1682] It has been suggested that provisions such as this may encourage companies to seek consent decrees as a way of minimizing compliance with Title VII. J.E. Maslow, "Is Title VII Sinking," Juris Doctor 28, 36 (September 1974).

[1683] The decree provides that "if a private individual seeks, in a separate action or proceeding, relief other than back pay which would add to or be inconsistent with the systemic relief incorporated in this Decree, the plaintiffs will undertake to advise the Court or other forum, in which such private action or proceeding is brought, that such relief in that action or proceeding is unwarranted." Steel agreement, supra note 1672.

[1684] EEOC recently informed this Commission that:

> despite the 60 day limit, EEOC generally refrains from processing deferred charges until the 706 agency either completes action or waives jurisdiction. Perry letter, supra note 1566.

A State or local agency is eligible for 706 status if it can certify that it has the authority to administer and enforce an anti-discrimination law that is comparable in scope to Title VII coverage. Specifically, for a State or local agency to qualify as a 706 agency, the law which it administers must protect persons from discrimination on any of the bases covered by Title VII;[1686] and include in the prohibited practices essentially all of the practices prohibited by Title VII. In addition, the State or local agency must administer the law in a manner consistent with Title VII, providing remedial relief, such as reinstatement and back pay or criminal penalties.[1687]

1685. 42 U.S.C. s 2000e-5(c) (1970). Those agencies which do not qualify as 706 agencies may be designated "notice" agencies. Agencies receiving this classification receive notice of any charges filed arising within their jurisdiction but are not actually deferred to.

1686. 29 C.F.R. s 1601.12 (1975). EEOC has eased its requirements for designation as a 706 agency. Prior to January 1975, the law administered by an agency had to cover all of the bases of discrimination covered by Title VII. Thereafter, the requirement was amended so that an agency administering a law covering any one basis, such as race or sex, can qualify. Id.

1687. As of January 1975, civil rights agencies in the following States had been designated by EEOC as 706 agencies: Alaska, Colorado; Connecticut; Delaware; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Massachusetts; Michigan; Minnesota; New Hampshire; New Jersey; New York; Ohio; Oklahoma; Oregon; Pennsylvania; South Dakota; Utah; Washington; West Virginia; Wisconsin; and Wyoming. The following States had agencies which were designated notice agencies: Arkansas; Florida; Georgia; Montana; North Dakota; Ohio; and South Carolina.

In theory, the deferral of charges is an important means of reducing the backlog.[1688] In practice, however, it has done little to alleviate EEOC's caseload. During fiscal year 1974 EEOC deferred 32,173 charges to State and local agencies but only approximately 7,000 of these charges were processed by the agencies.[1689] In most cases, the agencies simply waived jurisdiction over the cases to EEOC.

There is evidence that some State agencies are not anxious to prosecute deferred EEOC charges. The Illinois Human Relations Commission, for example, routinely waives jurisdiction over deferred charges unless the charging party also personally files the charges with them.[1690] The California agency employs the same procedure.[1691] In both instances, the agencies cited their own workloads as the justification for this practice.

1688. EEOC has indicated that it hoped to utilize this resource heavily to reduce the backlog. Powell interview, supra note 1510; Powell letter, supra note 1601.

1689. During the period from July 1, 1972 through April 30, 1973, 19,850 charges were deferred and 17,152 were returned. The charges which are retained by State and local agencies are presumably processed to some resolution, although EEOC does not keep records on the dispositions of these charges. Telephone interview with Rodney Cash, Office of State and Community Affairs, ELOC, Mar. 10, 1975.

1690. Interview with Wayne Williams, Director, Illinois Human Relations Commission, May 3, 1973, in Chicago, Ill.

1691. Interview with Paul Meany, Executive Director, California Fair Employment Practices Commission, Mar. 23, 1973, in San Francisco, Cal.

EEOC attempts to improve the ability of State and local agencies to resolve charges and, thereby, ease its own load by providing financial assistance. In fiscal year 1973, the EEOC appropriation for State and local agencies was $1.7 million.[1692] Agencies in the Atlanta Region received three percent; Boston, 11 percent, Chicago, 22 percent; Dallas, 5 percent; Kansas City, 7 percent; New York, 18 percent; Philadelphia, 20 percent; and San Francisco and Denver combined received 14 percent of the funds.[1693] In fiscal year 1974, EEOC received $2.5 million for this purpose which it distributed to 48 State and local agencies. The amount allocated for fiscal year 1975 is $3.5 million and the President has requested $8 million for this program in fiscal year 1976.[1694] Most of EEOC's grants to the State and local agencies

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1692. State and local agencies apply for funds by submitting an "Application to Provide Services" to EEOC indicating the type of project for which funding is requested, its goals, and the amount of money needed. Agencies are approved for funding subject to the negotiation of a satisfactory agreement. These funding agreements contain four major sections: an outline of the scope of the work to be performed by the agency; an agreement as to EEOC's cooperation with the agency in processing charges; standard government requirements for contracts; and a budget. The agencies are required to report monthly to EEOC on work done under the contracts. Agencies are not permitted to absorb EEOC funds into their own general funds, nor may they reduce their own expenditures as a result of these funds. Brown letter, supra note 1588.

1693. Id.

1694. Walsh letter, supra note 1480.

were to hire staff either to initiate pattern or practice cases against major employers or to process deferred charges.[1695]

The Pennsylvania Human Relations Commission, for example, received the largest allocation of funds ($210,000) in fiscal year 1974. Most of this money was used to pay the salaries of attorneys trained by EEOC to process pattern or practice cases. As a direct result of this program, pattern or practice charges were initiated against 83 Pennsylvania companies.[1696] Similarly, the $107,000 allocated to the Massachusetts Commission Against Discrimination was used to pay the salaries of five attorneys who supervise the processing of charges at all stages.[1697] Although EEOC has no mechanism for following up on its own conciliation agreements, it granted the New York State Division on Human Rights $153,660 to, among other things, conduct systematic followup reviews of its conciliation agreements.[1698]

[1695] Brown letter, supra note 1588. EEOC specifies ten categories of projects which it will fund. Project Type 1 deals with situations in which discrimination exists at the initial hiring and recruitment level. The purpose of this type of project is to identify those elements in the system which operate to exclude protected classes and to require respondents to correct them through appropriate enforcement. Similarly, Project Type 2 has as its objective the identification of discriminatory barriers to promotion of affected classes. Type 3 projects deal with situations wherein the employer relies upon labor organizations to recruit employees. Projects dealing with any other areas of systemic discrimination fall into the Type 4 category.

Project Types 5, 6, and 7 are directed toward the goal of processing individual charges of discrimination. They are primarily for State and local agencies designated as 706 agencies which receive deferred charges. EEOC's invitation to submit proposals, prepared by the Office of State and Community Affairs, states that, in most situations, the applicability of these projects is to the processing of these deferred charges, but that it may also be for cases received directly by an agency as part of its original jurisdiction which would potentially be filed with EEOC if the charging party were not satisfied with the remedy obtained at the State or local level. Project Types 8, 9, and 10 deal with training, improvement in systems and procedures, and research and development, respectively. Id.

1696. Interview with Lucy DeCarlo, Acting Director, Office of State and Community Affairs, EEOC, May 30, 1974. EEOC has similar contracts with the Michigan Civil Rights Commission and the Connecticut Commission on Human Rights and Opportunities. By virtue of the contract, the Michigan Commission has filed two pattern or practice cases, one alleging race discrimination and the other alleging sex discrimination. Without the assistance of the EEOC funded legal staff, the Commission would have had to rely on State attorneys who might not have given high priority to civil rights enforcement. Telephone interview with Janet Cooper, Deputy Director, Compliance Division, Michigan Civil Rights Commission, June 7, 1974.

On the other hand, this type of project oriented assistance has little, if any effect on the State agencies' processing of deferred charges. The Director of the Connecticut Commission has indicated to EEOC that the contract funds could be put to better use if the State agencies were permitted to use them to hire investigative staff. The Connecticut Commission currently has an investigative staff of 25. It would take twice as many to process deferred EEOC charges efficiently. Telephone interview with Arthur Green, Executive Director, Connecticut Commission on Human Rights and Opportunities, June 7, 1974.

1697. DeCarlo interview, _supra_ note 1696.

1698. _Id_.

In addition, EEOC has attempted to use this funding program to standardize charge processing procedures in various kinds of cases. It contracted, for example, with the Rutgers Law School to produce a manual on processing refusal to hire cases. The Office of State and Community Affairs prepared and issued a similar manual on discharge cases. Under contract with the Columbia Law School, a manual on equal employment litigation was also prepared. These manuals are included as a part of the funding package for State and local agencies.[1699]

In fiscal year 1975, EEOC changed the focus of its aid to State and local agencies. The primary thrust of the funding programs is the processing of individual deferred charges, with less emphasis on pattern and practice cases.[1700] EEOC feels that this approach is more realistic in terms of obtaining real assistance from these agencies in reducing the backlog. EEOC's experience has shown that few, if any, of the State and local agencies are capable of providing this assistance at their current staffing levels. Utilizing this new funding concept EEOC expects State and local agencies to resolve approximately 13,000 charges in fiscal year 1975 and 25,000 charges in fiscal year 1976.[1701]

1699. EEOC has contracted annually, for the past three years with the International Association of Official Human Rights Agencies to provide training for approximately 700 State and local agency employees. The International Association of Official Human Rights Agencies is composed of State and local human rights agencies. One of its functions is to provide training to the staffs of member agencies. DeCarlo interview, supra note 1696.

1700. Id.

1701. Powell letter, supra note 1601. EEOC has indicated that, as a result of this change of focus, "state and local agencies have made significant contributions to backlog reduction." Walsh letter, supra note 1480. The Commissioners, however, do not have charge resolution statistics to substantiate these contributions. Walsh et al. interview, supra note 1482.

In adopting this approach, EEOC is, in effect, contracting out for personpower to process its charges. This is a dubious approach in view of the past inadequate record of many State and local agencies.[1702] Even if this approach is used exclusively, however, it is doubtful that EEOC's appropriation is sufficient to provide for significant State and local agency assistance. Without greatly increased funding, these agencies have no real incentive to enlarge their workloads by providing this assistance.[1703] EEOC would need at least five times its current appropriation for this program if it is to purchase all of the assistance that it needs from these agencies.

It is also evident that insufficient efforts have been made to coordinate Federal efforts with State and local compliance activities. State and local officials from agencies have expressed the need for the exchange of information regarding Federal regulations, procedures, guidelines, and data collection and analysis formats.[1704] Clearly, these agencies can be of little assistance to EEOC if they are not well-informed of its functions and procedures.

[1702] H. Hill, "Is the Past Prologue? The Law and Employment Discrimination," The Crisis 56, 57 (February 1975). See also H. Hill, Twenty Years of State Fair Employment Practices Commissions: A Critical Analysis With Recommendations, 14 Buffalo L. Rev. 22 (1964).

[1703] It has been proposed that EEOC delegate to State and local agencies all of its responsibility for processing one-on-one charges. Having freed itself of this responsibility, and the attendant backlog, EEOC could then devote all of its resources to combating systemic discrimination. Blumrosen, *supra* note 121, at 60. For a discussion of the interaction between EEOC and State and local agencies which concludes that it might be a good idea to amend Title VII to allow complainants to make a binding election between Federal and State forums, see Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1,212-16, 1,274-75 (1971).

[1704] At the Regional Conference on Civil Rights which was held on February 11, 12, and 13, 1974 in St. Louis, Mo., for example, many of the State and local civil rights agency participants indicated that they were not cognizant of Federal procedures for processing complaints of discrimination.

VI. Voluntary Compliance

The responsibility for encouraging the voluntary compliance of employers with Title VII is with the Office of Voluntary Programs. While this Office has set itself a goal of 61 voluntary agreements, only one such agreement had been reached as of March 1975, and EEOC's Voluntary Programs staff has functioned mainly as a technical resource for interested employers and as a public relations arm for EEOC.[1705]

The regional voluntary programs staff, for example, devotes most of its time to giving speeches before community groups and conducting seminars and workshops for interested employers on affirmative action. It also responds to requests from employers for assistance in preparing and reviewing employment tests and forms.

The low priority placed on voluntary programs in the past by EEOC's management was based on the belief that, once the effect of EEOC's legal enforcement powers was fully felt, unions and employers would voluntarily seek the agency's assistance in conforming their employment practices to the requirements of Title VII.[1706] Until such time, it was believed that employers had no real incentive to enter into voluntary affirmative action agreements with EEOC. In fact, rulings issued by courts today should provide ample incentive for employers to seek voluntary compliance. For example, in a plant or series of plants having 10,000 employees, 2,500 of whom are black, where the average income for whites is $8,000 and the average income for blacks is $6,400, there would be a potential back pay liability of $4 million a year (the $1,600 difference multiplied by the 2,500 black employees). If charges had been filed in 1965, for example, the company's total liability, at $4 million a year for 7 years, would be $28 million.[1707]

[1705] Cody interview, supra note 1489.

[1706] Id. As of March 1975, the voluntary compliance program was, in effect, suspended due to unresolved questions regarding the legal enforceability of voluntary agreements. Negotiations with major employers which had been conducted by voluntary programs staff had been assigned to conciliators. Telephone interview with George Butler, Acting Director, Office of Voluntary Programs, EEOC, March 25, 1975.

EEOC's only voluntary agreement was obtained in the San Francisco Region with the Pacific Gas and Electric Company. The agreement, dated October 15, 1973, contains provisions for increased recruitment, hiring and placement of women, Asian Americans, and black and Spanish surnamed American men. In addition, the company agreed to validate its tests for entry level and apprentice positions. Goals are to be established

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1707. David Rose, Chief Employment Section, Civil Rights Division, Department of Justice, "The Challenge of Civil Rights," Bus. Law. 42 (March 1973). See also H. Hill, The New Judicial Perception of Employment Discrimination: Litigation Under Title VII of the Civil Rights Act of 1964, 43 U. Colo. L. Rev. 243, 252-54 (1972).

by the company for women, blacks, and Spanish surnamed Americans based on their representation, respectively, in the working age population of the appropriate customer service area.

The agreement contains no provision for remedial relief, such as back pay, to employees who have suffered from discrimination in the past. The agreement is also lacking in several other areas. It does not identify the members of the affected classes and does not contain a revised transfer system for minority males. The agreement requires no utilization analysis of the company's workforce which, according to EEOC's guidelines for affirmative action, is a prerequisite for any affirmative action plan.[1708] Similarly, its provisions for validating tests do not conform with EEOC's Employee Selection Guidelines. In these respects, it is considerably weaker than not only the AT&T and the steel industry consent decrees, but also EEOC's conciliation agreements.

It is essential that the voluntary agreements obtained measure up fully to EEOC's standards for its conciliation agreements and court decrees. Voluntary agreements will be of little value if they do not require the same degree of affirmative action as is required by the compliance process. If the agency maintains lesser standards for voluntary agreements, employers may seek to use this mechanism as a refuge from EEOC's enforcement powers.

1708. These guidelines were issued by the Office of Voluntary Programs, which also negotiated the agreement. See EEOC, Affirmative Action and Equal Employment: A Guidebook for Employers (1974).

VII. Coordination with Other Agencies

EEOC is one of several Federal agencies with responsibility for enforcing equal employment opportunity.[1709] Virtually every Federal agency has some duty to assure nondiscrimination in its own employment practices, in those of recipients of its financial assistance, or in those of its contractors. In this light, it is important that duplication of effort and diversity of requirement be minimized and that cooperation and coordination be maximized. EEOC has begun to recognize the necessity and importance of this objective. In fiscal year 1975 former Chairman Powell created the Office of Federal Liaison for this purpose.

A Memorandum of Understanding was developed between EEOC and the Office of Federal Contract Compliance (OFCC) that went into effect on May 20, 1970. In September 1974, EEOC and OFCC signed a new Memorandum of Understanding[1710] that in many respects was identical to the 1970 agreement,[1711] which was never truly implemented. The new provision largely reflected the changes in EEOC's enforcement powers.[1712] EEOC also entered into an agreement with the Department of the Treasury's Office of Revenue Sharing "to establish a joint working relationship designed to enable both agencies to resolve complaints of employment discrimination against public employers and their contractors."[1713] In addition, the Chairman of the Equal Employment Opportunity Commission wrote to Federal regulatory agencies in support of recommendations made by this Commission[1714] that those agencies adopt rules prohibiting employment discrimination by the industries they regulate.[1715]

[1709] Other Federal agencies with major civil rights responsibilities in the area of employment discrimination are: the Department of Labor-the Office of Federal Contract Compliance and the 17 compliance agencies to which it has designated authority (Federal contractors); Department of Labor-Wage and Hour Administration (equal pay violations); the Department of Justice-Civil Rights Division (court action against State and local governments and Federal government contractors); the Department of Justice-Law Enforcement Assistance Administration (law enforcement and the criminal justice systems of State and local government); the Civil Service Commission (Federal and State and local government employment); the Federal Communications Commission (broadcasting industry and telephone and telegraph communications); and the Office of Revenue Sharing of the Department of the Treasury.

[1710] Equal Employment Opportunity Commission and Office of Federal Contract Compliance: Memorandum of Understanding, Sept. 11, 1974, 39 Fed. Reg. 35855 (1974).

[1711] Equal Employment Opportunity Commission and Office of Federal Contract Compliance: Memorandum of Understanding, May 20, 1970, 35 Fed. Reg. 8461 (1970).

1712. The 1974 agreement, like the one reached in 1970, provided that data would be exchanged on outstanding Title VII charges and Executive order compliance reviews, as well as information concerning specific respondents. As in 1970, each agency agreed to notify the other before conducting an investigation or compliance review of an employer. Both memoranda of understanding also stipulated that complaints filed with OFCC would be referred to EEOC. The 1974 Memorandum contained new provisions including an agreement to establish a task force to develop mutually compatible investigative procedures and compliance policies. In addition, each agency agreed in 1974 to notify the other before issuing a debarment notice or instituting a Title VII lawsuit and to coordinate their efforts with regard to industry-wide projects. Memorandum of Understanding (1970), _supra_ note 1711; Memorandum of Understanding (1974), _supra_ note 1710. Both agreements lacked provisions concerning coordination of Title VII and Equal Pay Act enforcement.

1713. For more on this point see U.S. Commission on Civil Rights, _The Federal Civil Rights Enforcement Effort--1974, Vol. IV, To Provide Fiscal Assistance_ 120-124 (February 1975).

1714. U.S. Commission on Civil Rights, _The Federal Civil Rights Enforcement Effort--1974, Vol. I, To Regulate in the Public Interest_ (November 1974).

1715. See, for example, letter from John H. Powell, Jr., Chairman, EEOC, to Richard Wiley, Chairman, Federal Communications Commission, Dec. 19, 1974.

EEOC participates on three Joint Reporting Committees that monitor and evaluate, on a continuing basis, the content and use of Equal Employment Opportunity (EEO) Report forms. The Committee for the EEO-1 form consists of EEOC and OFCC. EEOC, the Civil Service Commission, the Department of Labor, the Department of Housing and Urban Development, and the Law Enforcement Assistance Administration of the Department of Justice form the Joint Reporting Committee for the EEO-4 form for State and local governments. An EEO-5 Report form for elementary and secondary schools and an EEO-6 Report form for colleges and universities are being developed by a Committee consisting of EEOC and the Department of Health, Education, and Welfare.[1716]

The Equal Employment Opportunity Coordinating Council (EEOCC), of which the EEOC Chairman is a member, was created by the 1972 amendments to Title VII.[1717] It is charged with "the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies, and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders and policies." The Council's major effort since its creation was the development of draft, uniform testing guidelines for private employers and State and local governments. As of March 1975, the Council was still working on these guidelines.[1718]

1716. Brown letter, supra note 1588.

1717. 42 U.S.C. § 2000e-14 (1972). The other EEOCC members are the Secretary of Labor, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Commission on Civil Rights.

1718. See Chapter 6 of this report covering the EEOCC.

Chapter 6

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL (EEOCC)

I. Introduction

A number of agencies have responsibility for enforcing civil rights laws, regulations, or Executive orders which ban employment discrimination. Chief of these are the Equal Employment Opportunity Commission (EEOC), which enforces Title VII of the Civil Rights Act of 1964, as amended;[1719] the Department of Labor (DOL), whose Wage and Hour Division and Office of Federal Contract Compliance (OFCC) are responsible, respectively, for enforcing the Equal Pay Act[1720] and Executive Orders 11246 and 11375;[1721] the Department of Justice, which represents the Federal Government in Title VII litigation against State and local governments and in court enforcement of employment provisions of a number of other statutes, such as the

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[1719] 42 U.S.C. § 2000e, et seq.

[1720] 29 U.S.C. § 206(d), amending the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq. The Education Amendments of 1972 extended the coverage of the Equal Pay Act to include executive, administrative, and professional workers. 29 U.S.C. § 213(a).

[1721] Exec. Order No. 11246, 3 C.F.R. 339, 42 U.S.C. § 2000e (1965), as amended by Exec. Order No. 11375, 3 C.F.R. (1967). The OFCC has delegated certain responsibilities for enforcing the Executive orders to 16 Federal agencies, called contract compliance agencies, which review contractors' affirmative action plans. The contract compliance program is discussed more fully in Chapter 3 supra.

Revenue Sharing Act of 1972;[1722] the Civil Service Commission (CSC), which monitors the employment of State and local governments under the provisions of the Intergovernmental Personnel Act of 1970,[1723] in addition to overseeing the investigation of Title VII complaints against Federal agencies and the affirmative action requirements imposed on Federal employers pursuant to Executive Order 11478;[1724] and the Department of Health, Education, and Welfare (HEW), which enforces Title IX of the Education Amendments of 1972.[1725]

A. Need for Coordination

Basic principles of management require a system of coordination to make dispersed authority effective. In the words of Alfred P. Sloan, Jr., long time President and Chairman of the Board of General

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[1722] 31 U.S.C. §§ 1221-1263 (Supp. III, 1973) and 26 U.S.C. §§ 6017A and 6687 (Supp. III, 1973). The Department of Justice also represents the Federal government in court enforcement of Executive Order 11246.

[1723] 42 U.S.C. §§ 4701, et seq.

[1724] Exec. Order No. 11478, 3 C.F.R. 133, 42 U.S.C. § 2000e (1969). Title VII was amended in 1972 to extend coverage to Federal employment. 42 U.S.C. § 2000c-16.

[1725] 42 U.S.C. §§ 4701-4772. Other equal employment enforcement programs include those of the Federal Communications Commission (FCC) and the Law Enforcement Assistance Administration (LEAA) in the Department of Justice. The FCC equal employment rules are discussed in The Federal Civil Rights Enforcement Effort--1974, Vol. 1, To Regulate in the Public Interest ch. 1 (November 1974). LEAA's enforcement effort is described in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. VI (in print).

Motors, "...each part may strengthen and support each other part...thus welding all parts together in the common interests of a joint enterprise...."[1726] Sloan was speaking, of course, of General Motors. But the need he cited is no less essential to the Government's approach to equal employment opportunity.

In 1971, this Commission found that there was no system of coordination among the Federal agencies with equal employment enforcement responsibilities:

> The agencies have adopted their own program goals, priorities, and mechanisms on an independent basis. Furthermore, each has developed criteria for initiating action and implementing their findings in isolation from other agencies.[1727]

Thus, the Commission concluded that lack of coordination had resulted in "a critical misuse of limited staff resources and the dissipation of enforcement potential."[1728] Symptomatic of the problems of the failure to join forces were instances of refusal of one agency to share information with another, overlapping investigations, and inconsistency in the standards used by the agencies to evaluate the employment practices of an employer. The most glaring example of deficient coordination was the Crown-Zellerbach case,[1729] in which the seniority plan recommended by EEOC was deemed inadequate by the Department of Labor and replaced by a second plan which was subsequently successfully challenged by the Department of Justice in Title VII litigation.[1730] The Government's approaches to Delta Airlines and AT&T were only slightly less disjointed. In 1971, the Department of Justice investigated Delta but agreed to defer initiating a Title VII lawsuit if the compliance agency, the Department of Transportation, negotiated with the company an acceptable affirmative action plan under the Executive orders. Without notifying the Department of Justice, the compliance agency approved a plan which was inconsistent with the standard delineated by Justice. As of 1974, the company's compliance status had still not been completely resolved.[1731] AT&T's employment practices were first challenged by EEOC in 1971 before the

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[1726] Harlow H. Curtice, The Development and Growth of General Motors, a statement before the Subcomm. on Anti-Trust and Monopoly of the United States Senate Comm. on the Judiciary, Dec. 2, 1955.

[1727] See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 124 (1971) [hereinafter referred to as Enforcement Effort report].

[1728] *Id*.

1729. Local 189, United Papermakers v. United States, 416 F.2d 980, 984, 985, (5th Cir. 1969).

1730. Enforcement Effort report, supra note 1727, at 124.

1731. OFCC and the Department of Justice signed a consent agreement with Delta in 1973, which provided for the terms of an affirmative action plan to be developed by the company. The plan was submitted to OFCC in August 1973, but as of April 1975, OFCC had still not determined whether it was acceptabie. For a more detailed account of the Delta case, see Chapter 3 supra.

Federal Communications Commission. During these proceedings, the contract compliance agency, the General Services Administration (GSA), approved AT&T's company-wide affirmative action plan, which conflicted with certain minimum requirements EEOC had stated to GSA were essential.[1732] OFCC later revoked GSA's approval of the plan.

B. Previous Attempts To Coordinate

Until 1969, there were only ad hoc attempts at coordination among agencies with equal employment responsibilities.[1733] In each instance, coordination disintegrated. As a result, the EEOC and the

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[1732] For further discussion of these events, see Chapter 5 supra. In the fall of 1972, EEOC and the Departments of Labor and Justice entered joint negotiations with AT&T which led to a significant consent decree, described in Chapter 5 supra.

[1733] The first significant attempt at coordination among agencies with equal employment responsibilities occurred as early as 1966 when EEOC, OFCC, and the Departments of Defense and Justice negotiated a conciliation agreement with Newport News Shipbuilding and Dry Dock Company. Coordination later disintegrated, however, and no enforcement action was taken when the agreement was breached by the company. See Enforcement Effort report, supra note 1727, at 124-25.

In another instance, that of the textile industry, a series of meetings was held, beginning in 1967, involving EEOC, OFCC, and the Department of Defense (DOD) to ensure that the same general policies were being followed by the Federal Government. DOD conducted compliance reviews between January and August 1968 which resulted in findings of noncompliance with the Executive order on the part of three firms, Dan River Mills, Burlington Industries and J.P. Stevens and Co., Inc. The Government's unified position, which required the initiation of enforcement action against the mills, disintegrated in February 1969 when the newly appointed Deputy Secretary of Defense accepted oral commitments from the companies despite regulatory requirements that such commitments be in writing. See Enforcement Effort report, supra note 1727, at 73-74.

Departments of Labor and Justice agreed to establish a formal mechanism for improving coordination.[1734] An Interagency Staff Coordinating Committee was established in July 1969 for the purpose of developing uniform standards, information exchange, and procedures on joint enforcement activity, as well as for on-going operational coordination.[1735]

The members[1736] of the Committee met weekly for three years, until 1972 when the Equal Employment Opportunity Coordinating Council was established.[1737] During that period the Committee accomplished one objective: the development by OFCC and EEOC of compatible regulations on employee selection (testing) standards. The regulations developed by both agencies required any employer using a test which has an adverse impact[1738] on minorities or women to develop an empirical study showing that the test is predictive of performance on the job.[1739] Both sets of regulations required the same types of test validation that are recognized by the American Psychological Association (A.P.A.).[1740]

[1734] The Committee was formed as a result of discussions between former Secretary of Labor, George Schultz and former Chairman of the EEOC, William H. Brown, III, concerning the need for better coordination among the agencies. Telephone interview with William Oldaker, former Special Assistant to former Chairman Brown, July 10, 1974.

[1735] Memorandum from Benjamin Mintz, Deputy Chief, Office of the Special Assistant to the Attorney General, to James D. Hodgson, Under Secretary of Labor; William H. Brown, III, Chairman, EEOC; Jerris Leonard, Assistant Attorney General; William Oldaker, then Special Department of Justice; and Lawrence Silberman, Solicitor of Labor; re: Coordination of the Federal Government Equal Employment Opportunity Program--Formation of the Interagency Civil Rights Staff Committee, July 8, 1969 [hereinafter cited as Mintz Memorandum].

[1736] The three agencies designated five representatives to the Committee: Benjamin Mintz, then Deputy Chief, Office of the Special Assistant to the Attorney General; William Oldaker, then Special Assistant to the Chairman, EEOC; James E. Jones, Sr., then Assistant Solicitor, Department of Labor; Alfred G. Albert, then Deputy Associate Solicitor, Department of Labor; and Robert R. Hobson, then Senior Compliance Officer, OFCC.

[1737] The Council is described on p. 585 infra.

The Committee was also responsible for the development of a Memorandum of Understanding between EEOC and OFCC on operating procedures, which initially appeared to be a major achievement but which was never effectively implemented.[1741] Signed on May 20, 1970, the Memorandum provided that OFCC and EEOC would routinely exchange information concerning pending investigations, employers under investigation, as well as outstanding and resolved complaints or charges. In addition, OFCC agreed to issue a show cause notice[1742] to each Federal contractor who did not reach a conciliation agreement with EEOC.[1743] The only provision even partially carried out was that which stipulated that complaints filed with OFCC would be deemed EEOC charges and would be promptly transmitted to EEOC.[1744] In practice, however, OFCC directed the compliance agencies to refer to EEOC individual complaints, but not those alleging systemic or class-wide discrimination.[1745]

[1738] Adverse impact is mentioned further in Chapter 3 supra.

[1739] OFCC regulations on employee selection standards, 41 C.F.R. § 60-3, are discussed more fully in Chapter 3 supra. EEOC's regulations, 29 C.F.R. § 1607, are treated in Chapter 5 supra.

[1740] For a description of these types of test validation, see p. pp. 600-603 infra.

[1741] Processing of Complaints of Employment Discrimination as between two agencies: Memorandum of Understanding, William H. Brown, III, Chairman, EEOC; George P. Schultz, Secretary of Labor; and John L. Wilks, Director, OFCC, May 20, 1970. 35 Fed. Reg. 8461 (May 29, 1970). Enforcement Effort report, supra note 1727, at 131.

[1742] A show cause notice shifts to the contractor the burden of going forward with evidence demonstrating why enforcement proceedings should not commence. The show cause notice is discussed more fully in Chapter 3 supra.

At the end of 1970, this Commission concluded that the Committee had not been successful in achieving its objectives for a number of reasons.[1746] Paramount among these was that Committee members continued to view themselves as representatives of individual agencies with separate and distinct roles, rather than as members of a group with responsibility for coordinating the Government's efforts. Thus, the Committee functioned, not as a group with a sense of its mission, but rather as an aggregate of individuals, each with a prerogative to preserve. Moreover, the individuals who represented the agencies were not at the policy-making level and thus could not commit their

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1743. Memorandum of Understanding (May 20, 1970), supra note 1741.

1744. Interview with Doris Wooten, Chief, Division of Policy Development, OFCC, July 30, 1973.

1745. Id.

1746. Enforcement Effort report, supra note 1727, at 136.

agencies to action or policy modifications. Finally, the Committee did not set any timetables for achieving the goals it established; as a result, there was little impetus for the agencies to commit resources to complete actions within reasonable time periods.[1747]

II. The Equal Employment Opportunity Coordinating Council

A. Establishment

In 1971, congressional committees in both the House and Senate, disturbed by the agencies' lack of coordination and OFCC's ineffectiveness, reported out legislation providing for the transfer to EEOC of OFCC's authority under the Executive orders and the pattern and practice authority of the Department of Justice under Title VII.[1748] In addition, the committees had concluded that the Civil Service Commission's record in enforcing equal employment in Federal employment under Executive Order 11478 had been "far from satisfactory."[1749] CSC's performance, the committees found, had been impaired by an inherent conflict of interest, since the agency was responsible for Federal personnel practices which were often being challenged on civil rights

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1747. Id.

1748. Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 (H.R. 1746, P.L. 92-261) Amending Title VII of the Civil Rights Act of 1964, 73-76 and 437-440 (Comm. Print 1972) [hereinafter cited as Legislative History]. The Commission supported these transfers. See Enforcement Effort report, supra note 1727, at 359.

1749. Legislative History, supra note 1748, at 83; see also 421-26.

grounds.[1750] Thus, both committees recommended extending Title VII to Federal employment. While the Senate committee concluded that certain responsibilities should be assigned to CSC with ultimate enforcement authority left to the Federal courts through litigation by Federal employees, the House committee recommended that enforcement authority be given to EEOC.[1751]

On both floors of Congress proponents of the bills stressed that consolidation of EEOC, OFCC, and the Department of Justice enforcement authority would "achieve coordination, clarity, and consistency in defining discrimination and in shaping a proper remedy."[1752] Litigants would be freed from "a multiplicity of suits, confusion over the intent and requirements of the law, and duplication of inspection and recordkeeping."[1753]

Despite the improvements anticipated as a result of consolidation of jurisdiction over employment discrimination, neither CSC's nor OFCC's authority was transferred to EEOC.[1754] Recognition of the problems EEOC would face with new enforcement powers and increased jurisdiction, combined with EEOC's already substantial backlog, dissuaded Congress from expanding EEOC's jurisdiction to Federal employment and government contractors.[1755]

[1750] *Id*. at 84 and 424.

[1751] *Id*. at 85 and 425. See also remarks by Senator Peter Dominick, *Id*. at 680 and 1,527.

[1752] *Id*. at 206 (Remarks by Representative Augustus Hawkins).

[1753] *Id*. at 207.

[1754] The 1972 Amendments to Title VII did, however, provide for the transfer of the Department of Justice's authority over private employment, effective two years after the date of enactment.

Immediately after the Senate vote deleting from the legislation the OFCC transfer provision,[1756] Senator Jacob Javits introduced a compromise measure establishing the Equal Employment Opportunity Coordinating Council (EEOCC). The Council, he said, was to be an office designed to ensure that OFCC was "effectively tied into the Equal Employment Opportunity Commission; and second, that someone on a high level [would] be riding herd, to see to it that the office is really effective where it is."[1757] The amendment, although hastily written, was adopted by agreement on the floor after assurances by Senator Javits that its purpose was to have attendance on the council "...at the highest level."[1758]

[1755] Legislative History, supra note 1748, at 917-44. EEOC's opposition to the proposed transfers was an important influence in this decision. See Testimony of William H. Brown III, Chairman, EEOC, before the Subcomm. on Labor and the Senate Comm. on Labor and Public Welfare, Oct. 4, 1971, as reprinted in Legislative History, supra note 1748, at 931.

[1756] Id. at 944.

[1757] Id. at 947.

[1758] Id. at 947-48.

Ultimately, the Equal Employment Opportunity Act of 1972[1759] provided that the Council be composed of the top officials of two agencies within the Executive Branch, the Secretary of Labor and the Attorney General, and the heads of three independent agencies, the Civil Service Commission, the Equal Employment Opportunity Commission, and the U.S. Commission on Civil Rights, "or their respective delegates."[1760] Under the Act, the Council is charged with responsibility for:

> developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders and policies. 1761

The Act also required the Council to report annually to the President and to Congress on its activities, along with its recommendations for legislative or administrative change.

1759. 42. U.S.C. § 2000e-14.

1760. Id.

1761. Id.

B. The Council Agencies

The histories, jurisdictions, and enforcement authority of the member agencies differ significantly and result in diverse perspectives on the Council. The Department of Justice, which is the chief litigator for the U.S. Government, places emphasis on avoiding procedures or policies that might impair its ability to pursue litigation successfully.[1762] Prior to the Equal Employment Opportunity Act of 1972, the Department had exclusive authority to represent the Federal Government in court actions under Title VII.[1763] The 1972 Amendments provided that this authority with regard to private employers and unions would be transferred to EEOC two years after enactment, and in the interim, would be shared with EEOC. However, the Department of Justice was given exclusive authority to sue State and local government employers which were added to Title VII coverage by the Amendments. In addition to this authority, the Department represents the Federal Government in any cases arising under Executive Order 11246 and the Revenue Sharing Act of 1972.

[1762] Interview with David Rose, Chief, Employment Section, Civil Rights Division, Department of Justice, June 5, 1974.

[1763] Title VII, as originally enacted, permitted the EEOC to file _amicus curiae_ briefs but not to represent the Government as a party in interest. An _amicus curiae_ brief or "friend of the court" brief is one which is filed by a party who is concerned with the outcome of a case but who is not a litigant.

Prior to the 1972 Act, EEOC was authorized only to investigate charges of discrimination under Title VII and to attempt to conciliate them, as well as to file amicus curiae briefs on behalf of private plaintiffs. The 1972 amendments to Title VII authorized EEOC to file suit in Federal court against any private employer or union after its administrative conciliation procedures had failed.[1764] Thus, EEOC attempts to fulfill its mission through both judicial and administrative actions. Like the Department of Justice, it places emphasis on maintaining a posture on substantive issues which will preserve its judicial interpretation of Title VII.[1765]

[1764] Section 706 of Title VII, 42 U.S.C. § 2000e-5, requires the EEOC to exhaust its administrative procedures of investigation and conciliation before it may file suit. Section 707, 42 U.S.C. § 2000e-6, which transferred to EEOC the pattern and practice authority of the Department of Justice, requires the EEOC to follow the procedures stipulated in Section 706 before it may exercise its Section 707 authority. This provision thus added certain conditions precedent to EEOC's pattern and practice litigation which had not been imposed on the Department of Justice.

[1765] Interview with Alvin Golub, Deputy Executive Director, EEOC, June 20, 1974. EEOC recently informed this Commission that:

> The EEOC focuses on three goals in its Coordinating Council efforts and in its activities with all other Federal agencies: (1) sharing statistical data and data on case processing in order to eliminate duplication and advance coordination of agency activities; (2) achieving a common definition that comports with current Court decisions; and (3) developing machinery to assure that all agencies implement these legal principles with their regulatees in such a fashion that they do not duplicate the EEOC compliance structure but, rather, build anti-discrimination compliance into their regulatory activities and that they coordinate both with EEOC cases. Letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, from Peter C. Robertson, Director, Office of Federal Liaison, EEOC, Apr. 29, 1975.

The Department of Labor is responsible for enforcement of a number of provisions which prohibit employment discrimination. Among these are Executive Order 11246, as amended, and the Equal Pay Act. Executive Order regulations require Government contractors to maintain written affirmative action plans for increasing minority and female employment, in each job title, with insufficient utilization of these groups based on their availability in the recruitment area workforce. Adherence to the Executive order requirements is monitored by compliance reviews of the contractors' facilities. These reviews are conducted primarily by 16 Federal agencies designated by the Department of Labor as contract compliance agencies. In addition to setting forth the policies and procedures of Executive order enforcement, the Department of Labor is responsible for monitoring and coordinating the contract compliance agencies.[1766] The ultimate penalty for noncompliance with the Executive order is debarment from holding Government contracts or the cancellation and termination of existing contracts after an administrative hearing. Prior to such a hearing, the compliance agency or OFCC must issue a show cause notice to the contractor requiring it to come forward with evidence showing why enforcement proceedings should not be commenced.

1766. The Department of Labor has been criticized consistently for deficiencies in its leadership of the Executive order program. See Enforcement Effort report, supra note 1727, at 50-84. See also Chapter 3 of this report.

The Equal Pay Act requires all employers covered by the Fair Labor Standards Act to pay the same wages or salaries to women and men employed in the same establishment for work which is substantially equal in terms of skill, effort, and responsibility. The Department of Labor's Wage and Hour Division investigates individuals' complaints and periodically conducts compliance reviews on its own initiative. If an Equal Pay Act violation is found and the Division is unable to obtain a settlement, the case is referred to the Solicitor of Labor for litigation in Federal court.

The Department of Labor's equal employment enforcement responsibilities are thus carried out through both informal and formal administrative proceedings, as well as through litigation. Moreover, the Equal Pay Act and the Executive order are just two of many labor standards provisions which the Department of Labor is responsible for enforcing.[1767] Hence, the Department's perspective on the Council is different from that of EEOC, which is a single-purpose agency, and from the Department of Justice, which is exclusively a litigator.

[1767] Among other labor standards provisions, the Department of Labor is charged with enforcing the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.*, the Service Contract Act, 41 U.S.C. § 351 *et seq.*, and all provisions of the Fair Labor Standards Act, *supra* note 1720.

The sole responsibility of the EEOC and Departments of Labor and Justice in the field of equal employment is to enforce the law. The Civil Service Commission, by contrast, has a dual responsibility on the Federal level as the central personnel agency for the Federal Government[1768] and enforcement agency for Executive Order 11478 and Title VII with regard to Federal employment. While discrimination has been barred in Federal employment since 1940,[1769] the Civil Service Commission has been charged with enforcing equal employment in Government service only since 1965.[1770] Under Executive Order 11478 the CSC monitors Federal agencies' affirmative action programs and handling of complaints. Title VII, as amended in 1972, authorizes the CSC to receive appeals from agencies' final actions on employment discrimination complaints and to order appropriate remedies, such as reinstatement and hiring, with or without back pay. In addition, CSC is responsible for enforcing equal employment requirements under

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1768. In this capacity, the CSC is responsible for enforcing statutory provisions governing the Federal civil service. For a discussion of some of these provisions, see Chapter 1 of this report, supra. CSC takes the position that the major difference between itself and the other Council agencies is that it is "an operating agency....In addition to enforcing the law, the Commission has operating responsibilities for assuring that equal employment opportunity is in fact carried out in Federal employment." Letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, from Robert E. Hampton, Chairman, CSC May 2, 1975 (attachment).

1769. See Enforcement Effort report, supra note 1727, at 19-21.

1770. Executive Order No. 11246, 3 C.F.R. 339, 42 U.S.C. § 2000e (1965).

the Intergovernmental Personnel Act. Under the Act, the CSC is responsible for ensuring that State and local governments receiving funding from some 30 Federal grant programs adhere to Federal personnel merit standards and that any receiving grants for personnel programs adhere to CSC regulations prohibiting discrimination.[1771]

The Civil Service Commission has been responsible since 1883 for ensuring that Federal employees are selected on the basis of merit without regard to political or personal affiliations.[1772] CSC views its essential purpose as maintaining the integrity of the Federal merit system and encouraging State and local governments to follow its example.[1773]

The Commission on Civil Rights, unlike any of the other agencies, is not responsible for implementing or enforcing any equal employment legislation, Executive orders or regulations. The statute which established the Commission[1774] limited its authority to the collection and analysis of information, appraisal of laws and policies, and submission of its findings and recommendations to the President and Congress.[1775]

[1771] 5 C.F.R. § 900, Subpart E. CSC's responsibilities under the Intergovernmental Personnel Act are discussed more fully on pp. supra.

[1772] Id.

[1773] Interview with Irving Kator, Assistant Executive Director, CSC, June 29, 1974. Subsequently, the Commission indicated that "(w)hile clearly the purpose of the Commission is to maintain the integrity of the Federal merit system, it is also to assure equal employment opportunity for all persons and to enforce Section 717 of Title VII of the Civil Rights Act, as amended." Hampton letter, supra note 1768. The Commission also stated that it does not ask State and local agencies to follow the Federal employment system, although it does encourage them to follow merit and equal employment principles. Id.

C. Authority of the Council

While the 1972 Act charged the Council with broad responsibilities,[1776] it gave the Council no authority other than that which might be volunteered by the individual agencies. Implementation of policies or practices developed by the Council is dependent on the complete acceptance of each of the members. In recognition of this limitation, the Council agreed in 1972 to make decisions by consensus rather than by majority vote. The Council also recognized that criticism of individual agencies' activities would seriously impair cooperation and thus agreed not to pass judgment on member agencies.[1777] Thus, the Council perceived, at the outset, that there were inherent defects in its statutory authorization which prevented it from "riding herd"[1778] on any agency.

[1774] 42 U.S.C. § 1975, as amended in 1972, Pub. L. 92-496.

[1775] In conjunction with its authority to hold public hearings, the Commission can subpoena witnesses and information; it is in this area that its actions are most susceptible to coordination with other agencies. The Department of Justice recently indicated that:

> We note that the report is highly critical of the Council, even though the Commission on Civil Rights is a member. We are not aware of any initiatives by the Commission to make the Council more effective. Indeed, I am advised that the Commission has apparently determined that since it is not an enforcement agency it should take no part in substantive decision making. The Congressional mandate of Section 715 of the Equal Employment Opportunity Act of 1972, however, makes no distinction between the responsibilities of the Civil Rights Commission on the one hand and the Departments of Labor and Justice, the Civil Service Commission and the Equal Employment Opportunity Commission on the other. The effect of the Commission's position is unfortunately to deprive the Council of a possible source of constructive contribution in an ongoing, timely fashion, rather than merely publishing less timely critiques. Letter to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, from J. Stanley Pottinger, Assistant Attorney General, DOJ, Apr. 25, 1975.

But see, however, pp. 555-56 infra. EEOC recently requested that the Commission adopt a formal policy statement describing its role on the Council. Robertson letter, supra note 1765.

[1776] The responsibilities of the Council are described on p. 585 supra.

D. Organization and Staffing

Although the legislative history of the Act indicates that Congress intended for the Council to operate at the "highest levels,"[1779] in practice most of the Council's activities have been conducted by a staff committee of individuals assigned on a part-time basis.[1780]

1777. EEOCC minutes Nov. 9, 1972; Rose interview, supra note 1762.

1778. This phrase was used by Senator Javits in explaining the purpose of the amendment establishing the Council.

1779. Legislative History, supra note 1748.

1780. EEOC created a full-time office to provide staff support to its Council activities. See note 1844 infra for further information on this office.

The agency representatives named in the Act, or their delegates, had met only 11 times as of February 1975, despite an agreement made in 1972 to meet 12 times per year.[1781] Only the CSC and the EEOC had been represented by the agency head. The Department of Justice had been represented by the Deputy Attorney General; the Department of Labor, by the Undersecretary; and the Commission on Civil Rights by its Staff Director. Formal meetings of the Council were often attended by representatives of the White House and the Office of Management and Budget (OMB).

At the suggestion of OMB, it was agreed that the Department of Justice would chair the Council.[1782] Both EEOC and this Commission recommended in 1972[1783] that a full-time staff be assigned to the Council, but this proposal was rejected by the members at the Council's second meeting in November 1972.[1784] Instead, a committee was established of employees from each agency, who were not released from their normal duties. The important nature of the regular program responsibilities of the Staff Committee Principals clearly limited the amount of time and energy they could contribute to EEOCC activities. For example, the representative of the Department of Justice is the head of the Employment Section of the Civil Rights Division and is, thus, the Department's senior litigator in the employment area. Similarly, CSC's representative, the Assistant Executive Director, is not only the third ranking CSC official, but is responsible for its entire civil rights effort.[1785]

[1781] EEOCC minutes, Nov. 9, 1972, supra note 1777. Meetings of the Council were held on the following dates: May 19, Nov. 9, 1972; Feb. 8, March 8, May 16, June 22, 1973; May 22, June 26, September 4, October 23, and November 13, 1974.

[1782] Report to the President, Equal Employment Opportunity Coordinating Council, June 29, 1972. According to OMB's regulations, the chairing agency is responsible for directing administrative arrangements for the body, including the calling of meetings, the preparation of agenda and reports and the providing of full secretariat services. OMB Circular No. A-63, Management of Interagency Committees, Mar. 2, 1964. The Department of Justice has fulfilled these responsibilities.

[1783] Letters to Mr. Frank Carlucci, Associate Director, OMB, from John A. Buggs, Staff Director-designate, U.S. Commission on Civil Rights, June 12, 1972; and William H. Brown, III, Chairman, EEOC, June 13, 1972.

[1784] EEOCC minutes, Nov. 9, 1972, supra note 1777. EEOC created an Office of Federal Liaison in July 1974 to implement its Council responsibilities and to deal with other Federal agencies. Robertson letter, supra note 1765.

[1785] In 1973 and 1974, staff was assigned almost exclusively to work on the development of uniform guidelines concerning employee selection standards. Both CSC and EEOC were regularly represented by six individuals each, two lawyers, two psychologists and two administrators. The Department of Justice was represented by two lawyers; the Department of Labor, one psychologist, one administrator, and one lawyer; while the Civil Rights Commission was represented by one individual, variously a lawyer or an administrator. The employees so assigned constituted the Staff Committee to the Council, with one individual from each agency designated as a Staff Committee Principal.

Assignment of staff on a part-time basis resulted in inordinate delays in conducting the committee's work. For example, the committee required six months to answer an inquiry from the Department of Transportation concerning the civil rights implications of an examination used by one of its bureaus.[1786] More recently, staff committee participants have indicated that they recognize the need for the assignment of some full-time staff to the Council or to agency activities with the Council.[1787] The Council has not, however, requested authorization from the Congress to hire full-time staff.

[1786] On July 27, 1973, the Director of Civil Rights for the Department of Transportation (DOT) requested the Chairman of EEOC to review, as early as possible, a written examination developed for use by the Bureau of Motor Carrier Safety to test a prospective driver's knowledge of the Bureau's safety records. On September 4, 1973, the Chairman referred the request to the Council for its review, since work on the joint testing guidelines was underway. Members of the Staff Committee met with DOT officials on October 10, 1973, to discuss the examination. It was not until April 1, 1974, six months later, that a letter stating the Council's judgment was sent to DOT.

[1787] Golub interview, supra note 1765; Kator interview, supra note 1773; and interview with George Travers, Associate Director, OFCC, June 17, 1974. The Department of Justice, however, is of the view that frequent changes in the leadership of some of the Council agencies caused the delays and lack of productivity. Pottinger letter, supra note 1775. The Civil Service Commission also indicated that it did not perceive the lack of a permanent staff as a cause for the delays, Hampton letter, supra note 1768.

III. Council Activities

Following the Council's first meeting in May 1972, OMB requested each member agency to suggest policy issues for the Council's future consideration.[1788] This Commission and EEOC recommended that the Council devote attention to the need for uniformity in reporting requirements, sharing of data, coordination in reviews and investigations, and the development of joint training programs, as well as assisting OMB in overseeing equal employment enforcement programs. Both EEOC and this Commission also emphasized the importance of developing a uniform interpretation of employment discrimination which would be consistent with judicial decisions.[1789] In contrast, the Department of Justice recommended a narrower scope of activity, with emphasis on surveying existing inter-agency agreements and developing uniform Federal guidelines on employee selection standards.[1790] The Civil Service Commission suggested no policy issues for Council discussion at that time.[1791]

[1788] Letter to John A. Buggs, Staff Director-designate, U.S. Commission on Civil Rights, from Frank C. Carlucci, Associate Director, OMB, May 30, 1972.

[1789] Letters to Frank Carlucci, Associate Director, OMB, from John A. Buggs, Staff Director-designate, U.S. Commission on Civil Rights, June 12, 1972; and William H. Brown, III, Chairman, EEOC, June 13, 1972.

[1790] Letter to Frank Carlucci, Associate Director, OMB from K. William O'Connor, Deputy Assistant Attorney General, Civil Rights Division, Department of Justice, June 8, 1972.

[1791] Letter to Frank C. Carlucci, Associate Director, OMB, from Robert E. Hampton, Chairman, CSC, June 9, 1972.

Ultimately, the Council decided to devote its immediate attention to the establishment of uniform guidelines on employee selection standards and public disclosure of information relevant to equal employment enforcement. The Council also agreed to postpone any attempt to develop coordination in investigations, as well as uniform procedures for data collection. There was no decision reached concerning joint training or the development of uniform Federal standards defining violations of employment discrimination provisions and appropriate relief. The Council further agreed that it would not review any agency proposals for legislation, although it might consider procedures for review of proposed rules and regulations.[1792]

Subsequently, at its meeting in March 1973, the Council agreed that each agency would circulate to the other members copies of all proposed rules two weeks prior to their publication in the Federal Register.[1793]

1792. EEOCC minutes Nov. 9, 1972, supra note 1777.

1793. EEOCC minutes Mar. 8, 1973, supra note 1781.

Two years later, the Council had not dealt with most of the policy issues it had agreed to consider, and it had not accomplished any of the objectives in the 1972 Act. Instead, the Council's limited resources were consumed by protracted negotiations and discussions toward developing uniform guidelines on employee selection (testing) standards. The testing guidelines project was given first priority by the Council in 1972 in light of specific instructions from the Congress[1794] and the serious inconsistencies among the positions taken by the agencies in litigation.[1795] As of February 1975, the attempt to develop uniform guidelines had been unsuccessful.

[1794] The Conference Committee Report on the 1972 Act had stated that the Council should review CSC's merit system standards in relation to the policies of EEOC and the Department of Justice. Legislative History, *supra* note 1748, at 423, 425, and 1,840.

[1795] See, for example, Douglas v. Hampton, 338 F. Supp. 18 (D.D.C. 1972), *aff'd in part*, *vacated in part*, No. 72-1376 (D.C. Cir. Feb., 27, 1975), in which the Civil Division of the Department of Justice defended the validity of the Federal Service Entrance Examination (FSEE) on grounds contradictory to the EEOC testing standards, which had been supported in numerous lawsuits by the Civil Rights Division of the Department of Justice. When the case was appealed to the U.S. Court of Appeals for the D.C. Circuit, the court requested EEOC to file an *amicus curiae* brief. The EEOC brief took the position that the FSEE had not been validated in accordance with Title VII Standards. Brief for the United States Equal Employment Opportunity Commission as *Amicus Curiae*, Douglas v. Hampton, *supra*. Although the appeal was filed in April 1972, oral argument was delayed until January 18, 1974, on the grounds that the EEOCC should be given the opportunity to resolve the differences in the agencies' positions on test validation.

In 1971, the Supreme Court unanimously held that Title VII made unlawful the use of any employment test or procedure having an adverse impact on minorities unless such test could be demonstrated to be job related.[1796] The Court noted that Title VII specifically permitted employers to use "any professionally developed ability test," but it ruled that such a test, if it adversely affected minority groups, must be demonstrated to be manifestly related to job performance. In rendering its decision, the court gave great deference to the standards on test validation[1797] which the EEOC had issued in 1970.[1798] The Court further held that use of such a test had to be justified by "business necessity."[1799] In 1971, the OFCC, in coordination with EEOC and the Civil Rights Division (CRD) of the Department of Justice, issued guidelines on test validation substantially identical to those issued by EEOC.[1800] In October 1972, the Civil Service Commission issued instructions on employee selection standards which differed substantially from the OFCC and EEOC guidelines.[1801]

[1796] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[1797] Validation is a term used by pschologists to describe the method utilized to demonstrate that a test or selection procedure is job related.

[1798] 29 C.F.R. § 1607 (1974).

[1799] Griggs v. Duke Power Co., supra note 1796. Business necessity, as defined by the courts, means "necessary to the safe and efficient operation of the business," invoked when there are available "no acceptable alternative policies and practices which would better accomplish the business purpose advanced or accomplish it equally well with a less differential impact." Robinson v. Lorillard Corp., 444 F.2d 791 798 (4th Cir. 1971).

[1800] 41 C.F.R. § 60-3 (1974).

There were four major differences between the approaches of CSC, on the one hand, and EEOC, OFCC, and CRD on the other.[1802] First, CSC imposed a validity requirement regardless of whether the selection technique had an adverse impact on a minority or sex group. The other agencies had authority to regulate only those tests that were shown to have an adverse or discriminatory effect.

Second, CSC recognized a method of proving job relatedness, called "rational validity," which the other agencies considered unacceptable.[1803] EEOC AND OFCC required all tests covered by their guidelines to be shown to have one of three types of validity recognized by the American Psychological Association:[1804] (1) content validity, which is shown by evidence that the test is a representative and statistically reliable sample of actual work skills or tasks;[1805] (2) criterion-related or empirical validity, which is shown by demonstrating a statistical relationship between the test and some important measure of job performance;[1806] and (3) construct validity, which is shown by demonstrating a statistical relationship between the test and some construct, or personality trait, and that the construct is required for satisfactory performance of the job.[1807] Both OFCC and EEOC guidelines require a demonstration of criterion-related validity unless such a study is not feasible.[1808]

[1801] Civil Service Commission, Testing and Employee Standard Instructions (1972), C.C.H. Emp. Prac. Dec. ¶ 3890 et seq.

[1802] The differences in the agencies' positions were summarized by the staff in a memorandum entitled "Equal Employment Opportunity Coordinating Council, Testing: A Summary of Differences in Approach," Jan. 31, 1973 /hereinafter cited as "Testing: A Summary of Differences".

[1803] Rational validity, according to CSC, is determined by a process of determining the duties and responsibilities important to successful job performance; identifying the knowledges, skills, and other requirements necessary for successful performance; and selecting or developing tests professionally designed to measure these knowledges and skills. The American Psychological Association does not recognize this method as acceptable. Standards for Educational and Psychological Tests and Manuals, American Psychological Tests, A.P.A., 1974 /hereinafter cited as APA Standards/ CSC maintains that rational validation is a recognized method of demonstrating job relations. Hampton letter, supra note 1768.

[1804] 41 C.F.R. § 60-3.5; 29 C.F.R. § 1607.5. APA Standards, supra note 1803.

Third, the agencies disagreed on the necessity of requiring validation for separate groups, or differential validity. The theory of differential validity is based on the hypothesis that minority or sex groups might do less well on a test without any corresponding diminution of job performance.[1809] CSC took the position that differential

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1805. Tests of skills or knowledge which applicants must bring to the job (for example, typing or driving skills) can be justified on the basis of content validity.

1806. Intelligence and aptitude tests normally need to be justified by a criterion-related validity study. CSC maintains that criterion-related validity is not synongmous with empirical validity and that all three validation techniques contain elements of empiricism. Hampton letter supra note 1768. In Douglas v. Hampton, supra note 1795, the court referred to criterion-related validity as "empirical."

1807. A psychological construct is "a theoretical idea developed to explain... some aspects of existing knowledge. Terms such as 'anxiety,' 'clerical aptitude', or 'reading readiness,' refer to such constructs...." APA Standards, supra note 1803, at 29. An example of a test that might have construct validity would be one measuring "sociability" of prospective salespersons. Id. at 30.

1808. 29 C.F.R. § 1607.5(a); 41 C.F.R § 60-3.5(a).

1809. The APA Standards state that it is essential to investigate possible differences in criterion-related validity for minority or sex groups. APA Standards, supra note 1803, at 43.

validation studies should not be required,[1810] while the other agencies' guidelines[1811] requred such validation for tests not having content validity and where such validation would be technically feasible.[1812]

Fourth, EEOC, OFCC, and CRD, in contrast to CSC, would not permit the use of a test by one employer which had been validated only in the context of its use by another employer with different applicant populations. The EEOC and OFCC guidelines required a separate validation study in such a case.[1813]

[1810] "Testing: A Summary of Differences," supra note 1802. Subsequently, in the beginning stages of the Council negotiations, CSC took the position that there should be some mention of differential prediction in the guidelines. CSC maintains that the difference among the agencies did not concern "the question of differential prediction itself, but rather when it should be done, how, and the effects of results." Hampton letter, supra. note 1768.

[1811] 2 A.C.F.R. § 1607.5(b); 41 C.F.R. § 60-3.5(b)(5).

[1812] The term "technically feasible" means having a sufficiently large sample of workers or minority workers, among other factors. EEOC and OFCC guidelines place the burden on the employer to prove that a validation procedure is not technically feasible. 29 C.F.R. § 1607.4(b); 41 C.F.R. § 60-3.4(c). The CSC instructions do not contain a reference to "technically feasible," since determination of "rational validity" is "almost always feasible." "Testing: A Summary of Differences," supra note 1802.

[1813] Thus, a test for a firefighter which had been shown to be job-related in one location could not be deemed valid and job-related in another location if the composition of the applicant population in the second location in terms of race, ethnicity, sex, age, socio-economic class, and education, were substantially different. "Testing: A Summary of Differences," supra note 1802.

In February 1973, the Council agreed that the staff should work from EEOC guidelines in an attempt to draft one set of testing regulations which would be applicable to State and local governments.[1814] By May 1973, the staff reported that some agreement had been reached but that differences remained.[1815] The Council directed the staff to complete the draft by June 1973.[1816] In its report to the President and Congress on June 29, 1973, the Council indicated that it intended to publish joint guidelines for comment in the fall of 1973.[1817] A draft was finally completed on August 23, 1973, and was informally circulated for comment in September to business and civil rights organizations, as well as to professional psychologists.[1818] As a result of the more than 100 comments received,[1819] the staff began in January 1974 to meet weekly in order to revise the draft guidelines.[1820] A proposed draft, dated June 24, 1974,[1821] was circulated for comment during the summer and on October 23 the Council met with representatives from various business and public interest groups, local governments, and the International Association of Official Human Rights Agencies to discuss the draft.[1822]

[1814] EEOCC minutes, Feb. 8, 1973. Although Congress had directed the Council to consider the applicability of EEOC's guidelines to Federal employment, the Council did not consider Federal employment until September 4, 1974. At that meeting the Council agreed that if guidelines were developed, they would apply to Federal employment as well as employment in the private sector and State and local governments. EEOCC minutes, Sept. 4, 1974. However, the Civil Service Commission subsequently took the position that it had not agreed to this provision and attempted to have the minutes appropriately revised. Telephone interview with David Rose, Chief, Employment Section, CRD, Department of Justice, Oct. 29, 1974. The Council later agreed, at its meeting on November 13, 1974, that the guidelines would cover Federal employment, EEOCC minutes, Nov. 13, 1974.

[1815] Report of Staff Committee on Testing, EEOCC, May 15, 1973. Although the staff reported to the Council that it has "made substantial progress in drafting the uniform set of guidelines, ..." no agreement had been reached on a definition of "technically feasible," the circumstances in which a test validation study could be transferred from one employer to another, or the significance of differential validity, among other factors. Id. These issues continued to be problematic in staff negotiations.

[1816] EEOCC minutes, May 16, 1973.

[1817] Letter to the President from Joseph T. Sneed, Deputy Attorney General, Chairman, EEOCC: Richard F. Schubert, Under Secretary of Labor; William H. Brown, III, Chairman, EEOC; Robert E. Hampton, Chairman, CSC; and John A. Buggs, Staff Director, U.S. Commission on Civil Rights, June 29, 1973.

[1818] EEOCC minutes, June 22, 1973.

[1819] The comments varied widely, but most commentators felt that the language of the guidelines was far too technical for employers to comprehend. State and local governments expressed deep concern that the guidelines would cause them unreasonable expense. Further, they strongly objected to the requirement, applicable only to State and local governments, that validation must be accomplished regardless of the existence of an adverse impact. See, for example, Recommendations of the Advisory State-local Task Force on Uniform Employee Selection Guidelines (Council of State-Governments, International City Management Association, National Association of Counties, National Governors' Conference, National League of Cities, National Legislative Conference, and U.S. Conference of Mayors) Oct. 29-30, 1973. The business community was more critical. For example, the National Association of Manufacturers objected to the guidelines' adoption of the American Psychological Association's standards and requirement of differential validity. Letter to Philip J. Davis, Director, OFCC, from Donald E. Butler, Chairman, Industrial Relations Committee, National Association of Manufacturers, Nov. 28, 1973.

[1820] Memorandum to Staff Committee, EEOCC, from David L. Rose, Chairman, Staff Committee, Nov. 6, 1973.

[1821] EEOCC minutes, June 26, 1974.

[1822] EEOCC minutes, Oct. 23, 1974. For various reasons most speakers before the Council opposed the draft guidelines.

This draft of proposed guidelines contained a number of serious deficiencies. First, it excluded Federal employment[1823] and did not make mandatory compliance by State and local governments.[1824] Since the 1972 amendments to Title VII apply the same statutory standards to these employers, this omission is clearly unwarranted.

Second, the draft guidelines excluded a number of important requirements contained in EEOC's guidelines, which have already been upheld by the courts. For example, current EEOC guidelines prohibit use of even validated tests unless the employer can demonstrate that there are no other alternative procedures which are less discriminatory; that is, that the discriminatory tests are justified by business necessity.[1825] This requirement, which is clearly mandated by the Supreme

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[1823] CSC recently informed this Commission that it believes this comment is in error and that it always had agreed to be bound by the guidelines as finally adopted. Hampton letter, supra note 1768.

[1824] The proposed guidelines state that the Civil Service Commission "notes" that State and local government employers "should...seek to use" procedures which meet the standards of the draft guidelines. It is important to recognize that by 1974 Federal courts had already begun to apply EEOC's guidelines to State and local governments. See, e.g., Boston Chapter, NAACP, Inc. v. Beecher, 504 F. 2d 1017 (1st Cir. 1973); Guardians Ass'n of N.Y.C.P. Dep't, Inc. v. Civil Serv. Comm'n, 490 F. 2d 400 (1973). CSC indicated that the language "should...seek to use" was included in the guidelines to reflect the effort by CSC to encourage State and local governments to apply the guidelines to all selection standards and not merely those standards having an adverse impact on minorities and women. Hampton letter, supra note 1768.

[1825] 29 C.F.R. § 1607.3(b). CSC recently indicated that the EEOCC had agreed that it was undesirable to require employers to prove that no less discriminatory standards are available; "All parties to the negotiations had agreed to provide for a reasonable demand that given known tests of equal validity, employers should seek to use the least discriminatory alternative." Hampton letter, supra note 1768.

Court's decision in Griggs v. Duke Power Co.,[1826] has been excluded from the Council's draft guidelines. The present EEOC guidelines also require that criterion-related validity be demonstrated unless it is not feasible to do so.[1827] The preference for criterion-related validity is important because it has been found to be much more objective than content validity.[1828] The Council's draft guidelines do not state this preference, although the courts have approved this provision in EEOC's guidelines.[1829]

Almost two years after work on the testing project had begun, the Council reported to the President and the Congress that "significant progress" had been made in developing a set of testing guidelines.[1830]

[1826] Griggs v. Duke Power Co., supra note 1856

[1827] 29 C.F.R. § 1607.5 (a).

[1828] APA Standards, supra note 1803. see also R.M. Guion, Personnel Testing 124 (1965). CSC doesnot consider criterion-related validity to more objective than content validity. Hampton letter, supra note 1768.

[1829] See, e.g., Douglas v. Hampton, supra note 1795; Davis v. Washington, no 72-2105 (D.C. Cir., Feb. 27, 1975); Boston Chapter, NAACP, Inc. v. Beecher, supra note 1824; Walston v. County School Bd. of Nansemond County, 492 F.2d 919 (4th Cir. 1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1, 333 (2d Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973). CSC maintains that "court approval for the preference for criterion-related validation is not clear" and notes that the Supreme Court has not ruled on the question. Hampton letter, supra note 1768.

[1830] Letter from Lawrence H. Silberman, Deputy Attorney General, Chairman, EEOCC; Richard F. Schubert, Under Secretary of Labor; John H. Powell, Jr., Chairman, EEOC; Robert E. Hampton, Chairman, CSC; and John A. Buggs, Staff Director, U.S. Commission on Civil Rights to the President, July 1, 1974.

However, the view of some of the staff members in the fall of 1974 was that the development of uniform guidelines was not feasible[1831] After the June 1974 draft had been developed, the agencies began to have disagreements on issues which had already been decided. For example, the Civil Service Commission changed its position on the requirement of differential validity, arguing that this provision should be eliminated from the Council's draft guidelines.[1832] Because the requirement of differential validity was deemed essential by the other agencies, it did not appear that a compromise would be reached. Indeed, a compromise on this issue by the other agencies would be unjustified in view of the increasing tendency of the Federal courts to uphold this requirement in EEOC's guidelines.[1833] The agencies also disagreed on the question of whether the guidelines would be applicable to Federal employment.

Finally, at its November 13, 1974, meeting, the Council decided that it should continue its efforts to attain a uniform Federal position on employee selection procedures. It requested the staff to rewrite the June draft within three weeks, and directed that the new draft be simpler and shorter, and contain modified provisions on differential prediction and the use of tests validated by other jurisdictions. Further, the Council decided that the guidelines were to be drafted to apply to the employment practices of the Federal Government.[1834] A new draft was circulated to the staff committee members in early December, but no agreement could be reached by the committee members at their February 11, 1975 meeting, and as of Mid 1975, no break in the deadlock seemed forthcoming.[1835]

[1831] Rose interview, supra note 1822. Although Mr. Rose believed the development of joint guidelines to be possible, it was his opinion that some of the staff did not share his view. Pottinger letter, supra note 1775.

[1832] CSC contends that it changed its position on differential prediction after public hearings. Hampton letter, supra note 1768. The requirement was later ordered modified by the Council see p. 609 infra.

[1833] See e.g., Boston Chapter, NAACP Inc. v. Beecher, supra note 1824; and United States v. Georgia Power Co., supra note 1829; the APA standards also state that it is essential to determine differential validity. See note 1803 supra.

On February 27, 1975, the U.S. Court of Appeals of the District of Columbia Circuit held in Douglas v. Hampton[1836] that the Federal Government's selection standards must comply with the EEOC Guidelines and, in particular, with the EEOC provisions requiring criterion-related validity. The Court's decision, which had been delayed for well over a year because of the EEOCC negotiations,[1837] appeared to moot many of the issues before the Council.

The most recent discussions concerning testing have been typical of those in the past. Negotiations have been characterized by sharp disagreement, tentative consensus, followed by the reopening of one or more previously resolved issues.[1838] The differences between the Civil Service Commission, on the one hand, and EEOC[1839] and the Departments of Labor and Justice, on the other, continue to be significant. An important factor in these differences is the dual position of the Civil Service Commission as a civil rights enforcement agency and an institution representing the interests of an employer.[1840] The conflict of interest in CSC's position, which was recognized by congressional committes in 1971,[1841] continues to exist.

[1834] EEOCC minutes, Nov. 13, 1974. CSC maintains that "The Council did not make this decision; it simply reiterated the statement made by Chairman Hampton at the November 13, 1974 meeting as well as earlier meetings of the Council that the Federal Government would follow the guidelines," Hampton letter, supra note 1768.

[1835] There was no Council meeting between November 1974 and March 1975.

[1836]. Douglas v. Hampton, supra note 1855.

[1837]. See note 1795 supra.

[1838] CSC recently wrote to this Commission that:

> This statment is correct, and reflects the difficult nature of the subject matter at hand. All agencies at some points found themselves indicated tentative agreement. It should be pointed out that some of this sharp disagreement was aided and abetted by representatives of the Civil Rights Commission who intermitently sat in on the negotiations, although they had no operating responsibility in connection with the guideline negotiations is given on the basis of the Civil Rights Commission membership on the Council and the CRC's position on this matter is anomalous, to say the least. Hampton letter *supra* note 1768.

[1839] EEOC recently informed this Commission that the thrust of its:

> ...efforts in dealing with the Testing qualification programs at the state and local government level follow the tone of the Senate Committee report (page 423 of *Legislative History*) when it reported the legislation that expanded the jurisdiction of Title VII. Specifically, the Committee urged a thorough reexamination of governmental testing and qualification program to assure that the "standards enunciated in the *Griggs* case are fully met." The Committee spoke of the "significant reservoir of expertise development by the EEOC with respect to dealing with problems of discrimination." EEOC's participation in the negotiations of the Coordinating Council on Guidelines has focused on assuring that the standards enunciated in the Griggs case are fully as of the time this letter is written it is our policy to continue active negotiations to achieve that goal. Robertson letter, *supra* note 1765

In the course of discussions concerning uniform testing guidelines, little else has been addressed and almost nothing of significance has been accomplished.[1842] In March 1973, the agencies agreed to circulate among themselves materials in advance of publications in the Federal Register.[1843]

[1840] CSC maintains that the differences among the agencies are caused by differences in philosophy, professional judgments, and practical experience. CSC also stated that it would not agree to any system which provided for quotas or discrimination against any group under the guide of equal employment opportunity and that it was the only agency of the Coordinating Council which had operating experience in validating tests and bringing some of this practical experience to the attention of other agencies without practical experience in this area made for some difference of opinion. Hampton letter, *supra* note 1768

[1841] Legislative History, *supra* note 1748, at 89 and 424.

[1842] CSC recently indicated that:

> This is a value judgment which we consider incorrect. Prior to negotiations having been broken off by the EEOC, the guidelines had reached a point where it appeared that with very little additional work agreement on the total package was possible. Hampton letter, *supra* note 1768.

[1843] EEOCC minutes, Mar. 8, 1973. This agreement, however, has not been consistently followed. For example, OFCC published compliance review procedures without advance circulation 38 Fed. Reg. 1337 (May 21, 1973).

The member agencies have also committed themselves to funding the development and validation of tests which could be widely applied in selecting employees for certain occupations commonly found in State and local governments.[1844]

On the other hand, important projects have been postponed or dropped. In March 1973, the Council agreed that the Department of Justice should retain its authority under Section 707 of Title VII to bring pattern and practice suits against private employers.[1845] The 1972 Act provided for the transfer of this authority to EEOC unless the President submitted a reorganization plan which provided for retention and which was not vetoed by Congress.[1846] In its 1973 report to the President and Congress, the Council stated that EEOC and the Department of Justice had been""directed" to confer on a proposal for retention of the Department of Justice's authority and to report back to the Council.[1847] However, the EEOCC never considered the matter again and took no steps to ensure implementation of tis recommendations. When it became clear that the transfer would take place, the Office of Management and Budget was called upon to conciliate differences between

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[1844] The Council's Report to the President and the Congress of June 29, 1973, indicated that the following occupations would be covered by the project: Firefighter, Social Service Worker, Corrections Officer (Guard) and State Highway Patrol Officer. Letter to the President, supra note 1830.

[1845] EEOCC minutes, Mar. 8, 1973.

[1846] 42 USC. § 2000-6(c)

[1847] Letter to the President, supra note 1890

EEOC and the Department of Justice concerning the reallocation of resources associated with the transfer.

In May 1973, the Council briefly discussed the need for developing uniform affirmative action requirements for State and local governments and a mechanism for coordinating enforcement efforts with regard to these employers. Staff was directed to begin discussing both topics after the testing issue was resolved. More than a year later, the Council agreed that the problem of overlap in affirmative action obligations was significant and should be given "high priority."[1848] As of February 1975, no steps had been taken concerning this problem.[1849]

Another matter which has been the subject of discussion by the staff committee is an asserted conflict in interpretations between Council member agencies of what constitutes permissible affirmative action within a merit system. This issue was raised by a November 29, 1974, letter from James H. Blair, the Executive Director of the Michigan Department of Civil Rights, to the members of the Council. Mr. Blair asserted that a remedial rule adopted by the State to increase minority and female employment was within the Employee Selection Procedures of EEOC, but was nonetheless held to be discriminatory by CSC officials.[1850]

1848. EEOCC minutes, June 26, 1974.

1849. In a related matter, the American Council on Education (ACE) in August 1974 wrote to the EEOCC complaining about certain inconsistencies in sex discrimination guidelines imposed on institutions of higher education by EEOC, OFCC, and the Department of Health, Education, and Welfare (HEW) pursuant to Title IX of the Education Amendments of 1972. Letter to Diane Graham, Assistant Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, from Roger W. Heyns, President, American Council on Education, Aug. 1, 1974. At its meeting on September 4, the Council agreed to defer considering this issue and to request HEW to coordinate its proposed Title IX regulation with the Council. EEOCC minutes, Sept. 4, 1974. As of March 1975 no discussions between the Council or its staff committee and HEW officials had taken place despite the fact that HEW was scheduled to issue its Title IX regulations during the winter of 1975.

1850. For a more complete discussion of this matter, see Chapter 2 supra.

Although the staff committee agreed that a prompt response to this matter was necessary, as of May 1, 1975, more than five months later, it had not been able to reach a conclusion.[1851]

Prior to the the establishment of the EEOCC in 1972, there had been intermittent attempts at coordination among OFCC, EEOC, and the Department of Justice.[1852] These efforts continued after EEOCC's formation. Coordinated actions by these agencies resulted in consent decrees with American Telephone and Telegraph Co. (AT&T) in January 1973 and with nine major steel companies and their unions in April 1974.[1853] In September 1974, EEOC and OFCC signed a new Memorandum of Understanding,[1854] which in many respects was identical to a 1970 agreement which was never followed.[1855] The new provisions largely reflected the changes in EEOC's enforcement powers.[1856]

[1851] The staff committee discussed this matter on four occasions between December 1974 and February 1975, but no actionable consensus was reached. In January 1975, the staff committee met with a representative of the Governor of the State of Michigan to discuss the issue. The committee agreed that a resolution of the matter should be postponed until the State had forwarded certain information concerning the implementation of its affirmative actions programs.

As of May 1975 the Council began to deal with the problem of "last hired, first fired." This system of laying off employees in the reverse order of their hiring has had a disproportionate adverse impact on women and minorities who have suffered discrimination in the past. In March 1975, EEOC had circulated draft Guidelines on Work Allocation to all Council members. For more on this point see section III of Chapter 5 of this report.

[1852] These attempts are briefly discussed on pp. 578-82 supra.

[1853] The AT&T steel consent decrees are discussed in Chapter 5 supra.

[1854] Equal Employment Opportunity Commission and Office of Federal Contract Compliance: Memorandum of Understanding, Sept. 11, 1974, 39 Fed. Reg. 35855 (1974).

[1855] The 1970 Memorandum is discussed in Chapter 3 supra.

Two of the Council's three annual reports to the President and the Congress have stated that its very existence has improved working relationships among the agencies.[1857] However, the foregoing examples of coordination were not accomplished under the auspices of the Council[1858] and were due to a number of other factors, including the new court enforcement authority of EEOC, the agency which has consistently been in the forefront of those pursuing equal employment rights.[1859]

[1856] The 1974 agreement, like the one reached in 1970, provided that the agencies would exchange data on outstanding Title VII charges and Executive order compliance reviews, as well as information concerning specific respondents. As in 1970, each agency agreed to notify the other before conducting an investigation or compliance review of an employer. Both memoranda of understanding also stipulated that complaints filed with OFCC would be referred to establish a task force to develop mutually compatible investigative procedures and compliance policies. In addition, each agency agreed in 1974 to notify the other before issuing a debarment notice or instituting a Title VII lawsuit and to coordinate their efforts with regard to industry-wide projects. Memorandum of Understanding (1970), supra note 1741; Memorandum of Understand (1974), supra note 1741. Neither agreement included provisions concerning coordination of Title VII and Equal Pay Act enforcement. Indeed, no Council discussions have concerned Equal Pay Act matters.

EEOC recently informed this Commission that immediately after the signing of the Memorandum of Understanding with OFCC, that agency and the Department of Defense substantially changed their policies on sharing with EEOC in their possession concerning contract compliance reviews of employers who are under investigation. EEOC and the Labor Department also directed appropriate regional and district staff to meet at the local level and come up with detailed implementing plans for their geographic areas. Approximately 20 such meetings were held. Robertson letter, supra note 1765.

1857. Letters to the President (June 29, 1973), supra note 1817 and (July 1, 1974), supra note 1830. The Civil Service Commission Chairman, in commenting on this report, wrote that "While it recognized that the Council has not yet achieved its potential, in hindsight the opportunities for coordination and development of consistent policy direction in the area of equal employment opportunity are great." Hampton letter, supra note 1768.

1858. CSC and the Department of Justice recently stated that this report should have treated the so-called four agency memorandum issued by the Departments of Labor and Justice, the Civil Service Commission and the EEOC in March 1973. The memorandum, entitled Federal Policy on Remedies Concerning Equal Employment Opportunity in State and Local Government Personnel Systems, contained a joint policy statement on the permissible use of hiring goals and timetables in State and local government employment for the guidance of field representatives and U.S. Attorneys. Hampton letter, supra note 1768 and Pottinger letter, supra note 1775. It should be noted, however, that the development of this agreement was carried on totally outside of the Council. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. VII (in preparation).

EEOC recently informed this Commission of its opinion that it has attempted to structure its own operations in a fashion to implement the mandate of Section 715 of the Civil Rights Act of 1972, which created the Council. In this regard it established an Office of Federal Liaison to deal with the Council and other Federal departments and agencies. EEOC has also entered into a Memorandum of Understanding with the Office of Revenue Sharing of the Department of the Treasury. For a discussion of that Memorandum, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. IV, To Provide Fiscal Assistance 120-24 (February 1975). In addition, EEOC wrote to the Civil Aeronautics Board, the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Power Commission, and the Federal Communications Commission concerning their responsibilities for promoting equal employment opportunity in the industries they regulate. Robertson letter, supra note 1765. See also Chapter 5 supra.

1859. The Department of Justice recently informed this Commission of its opinion that:

> The statement that EEOC "has consistently been in the forfront of those pursuing equal employment rights" is gratuitous and without support in the report. Pottinger letter, supra note 1775.

GENERAL FINDINGS AND CONCLUSIONS

During the last decade some progress has been made toward achieving the Nation's objective of equal employment opportunity. The laws and Executive orders cited in this report have contributed to this end. Nevertheless, the rate of progress has been inadequate and major problems of systemic discrimination continue to affect adversely minorities and women.

The Federal effort to end this discrimination has not been equal to the task. It has been seriously hampered by lack of overall leadership and direction, deficiencies in existing laws, and the assignment of authority to a number of agencies which have issued inconsistent policies, and developed independent and uncoordinated compliance programs. Attempts by the Congress and agency officials to rectify the problems which beset this enforcement program and prevent it from effectively assisting the classes adversely affected by discrimination have been largely unsuccessful.

I. There is no one person, agency, or institution which can speak for the Federal Government in this important area. Thus, employers, employees, and aggrieved citizens are left to their own devices in trying to understand and react to a complex administrative structure. Moreover, without comprehensive oversight there is no way to ensure that uniformly efficient enforcement programs exist in the various agencies.

II. Existing civil rights laws were weakened as a result of political compromises and do not provide an adequate framework within which Federal agencies can operate. Practical experience with and court interpretations of these laws have demonstrated that changes need to be made if a significant improvement in the present enforcement program is to be accomplished. Alterations are necessary in a number of provisions of Title VII of the Civil Rights Act of 1964, for example, in the sections which allow only court action to enforce the statute, require data from employers to be confidential, and limit the authority of the Equal Employment Opportunity Commission to investigate and litigate matters involving patterns and practices of discrimination.

III. The diffusion of authority for enforcing Federal equal employment mandates among diverse agencies is one of the paramount reasons for the overall failure of the Government to mount a coherent attack on employment discrimination. Agencies have different policies and standards for compliance. They disagree, for example, on such key issues as the definition of employment discrimination, testing, the use of goals and timetables, fringe benefits, and back pay. Moreover, there is inadequate sharing of information, almost no joint setting of investigative or enforcement priorities, and little cross-fertilization of ideas and strategies at the regional level. This fragmented administrative picture has resulted in duplication of effort, inconsistent findings, and a loss of public faith in the objectivity and efficiency of the program. This last deficiency is best exemplified by contrasting the opinion of many employers that they are being harrassed by Federal bureaucrats with the belief of many minorities and women that the Government's equal employment program is totally unreliable.

IV. Attempts to coordinate the overall Federal effort have been most discouraging. Efforts over the last 28 months to handle even one major issue, the development of joint testing guidelines, have been unsuccessful, and no other substantive issue has been considered for coordination. Moreover, even where one agency is charged with the responsibility for coordinating the enforcement activities of other agencies, as in the case of the enforcement practices of Federal agencies (Civil Service Commission) and Federal contractors (Department of Labor), there has been a serious failure to achieve effective and uniform implementation of the law.

Chapter 1

FINDINGS AND CONCLUSIONS

Civil Service Commission (CSC)

1. The United States Civil Service Commission oversees and sets standards governing the civilian personnel practices of the Federal Government, which employs nearly four percent of the Nation's work force. Title VII of the 1964 Civil Rights Act, as amended in 1972, prohibits Federal agencies and departments from discriminating against applicants or employees on the basis of race, color, religion, sex, or national origin. Under Title VII the Commission is responsible for ensuring that Federal employment practices are nondiscriminatory and for reviewing agency affirmative action plans on an annual basis. In addition, the Commission has been charged with enforcing Executive orders since 1965, which require agencies to maintain complaint procedures as well as nondiscriminatory practices.

2. It is the position of the Commission on Civil Rights that the Federal Government should be bound by the same standards on equal employment opportunity and affirmative action as govern the practices of all other employers. However, CSC maintains that it is not required to adhere to the Title VII guidelines established by the Equal Employment Opportunity Commission (EEOC) for all other employers or to follow the affirmative action principles applicable to employers who are Federal contractors.

3. Although Congress expressed deep concern in 1972 that many of the civil service employee selection standards appeared to be discriminatory, the Commission has failed to carry out its responsibility under Title VII

to demonstrate empirically that all Federal examination procedures having an adverse impact on minorities and women are manifestly related to job performance.

a. The Commission has adopted guidelines for demonstrating the job relatedness of examination procedures which are substantially weaker than the guidelines of the Equal Employment Opportunity Commission. The Supreme Court in 1971 gave great deference to the EEOC guidelines, which are applicable to private employers, as well as State and local governments.

b. To screen applicants for entry into major professional and administrative positions, the Commission has developed a new examination, the Professional and Administrative Career Examination (PACE), which has not been demonstrated empirically to be related to job performance or to lack cultural and/or sex bias.

c. The Commission has failed to conduct a systematic analysis to determine if its procedures for evaluating and ranking candidates on the basis of biographical information are discriminatory or to show empirically that such procedures are job related. A study conducted by the General Accounting Office in 1973 included substantial evidence that these procedures were not reliable indicators of job performance.

d. Federal law prohibits hiring officials from considering any candidates other than the top three ranked individuals when hiring from outside the civil service. This "rule of three" is required by statute. Available evidence indicates that CSC's ranking procedures are not reliable indicators of successful job performance and may, in fact, screen out qualified candidates. Nevertheless, the Commission has failed to recommend to Congress that the "rule of three" be modified to permit consideration of all qualified candidates.

e. The Commission has failed to make recommendations to Congress with regard to modifying the requirement that veterans be given preference in selection, although this provision has a clearly discriminatory impact on women.

f. CSC prohibits agencies from making race, sex, or ethnicity a criterion for selection of candidates even when agencies are attempting to adhere to affirmative action goals to eliminate the vestiges of prior discrimination.

4. The Commission's regulations governing complaint procedures to be maintained by agencies deny Federal employees a full and fair consideration of their employment discrimination grievances. The deficiencies in the Commission's previous regulations which were criticized by Congress in 1972 persist in the regulations in effect in early 1975.

a. Strict time limitations imposed on complainants at each stage of the process, as well as other prerequisites, pose serious barriers to Federal employees in bringing complaints. These barriers are not faced by employees who file discrimination charges before the Equal Employment Opportunity Commission.

b. Complainants alleging a pattern or practice of discrimination or discrimination on a classwide basis are not guaranteed the right to a hearing or expeditious investigation.

c. The agency charged with discrimination has the principal control over the framing of complaints, the investigation, and the final decision on complaints brought by their employees or applicants.

d. The Commission's instructions on complaint investigations suffer from a number of significant deficiencies, including the failure to define discrimination according to Title VII law and to provide adequate guidance on detecting discrimination in the selection process. The guidelines do not provide that complaint investigations consider whether general personnel practices have had a disproportionately adverse impact on the complainant's group. New guidelines in draft stage as of November 1974 would not correct most of the deficiencies in the current instructions.

e. Complainants alleging an individual act of discrimination are given the opportunity to have a hearing, but the hearing provided for in the Commission's regulations is not considered by the Commission to be an adversarial proceeding. Neither substantive nor procedural Title VII law is required to be applied. For example, Title VII case precedent, which holds that statistical evidence of disparities constitutes a prima facie violation of the Act, is not followed in these proceedings. In addition, the complaints examiner is instructed to apply a standard in making a determination which gives the benefit of the doubt to the allegedly discriminatory agency. Moreover, the examiner's determination is merely a recommendation to the accused agency, which has the authority to make the final determination, subject to limited review by the Commission's Appeals Review Board (ARB) and discretionary review by the Commission.

f. The Appeals Review Board, in issuing decisions on employment discrimination matters, has not followed the substantive Title VII law and, in some cases, has adopted interpretations of law inconsistent with Title VII.

g. Although Title VII provides Federal complainants the right to file a civil action in Federal district court, a number of courts have limited this proceeding to a review of the administrative record, while other courts have permitted Federal plaintiffs a trial de novo.

h. Although the 1972 Amendments to Title VII gave the Commission additional authority to provide retroactive relief to victims of discrimination, such relief appears to be provided in only three percent of the instances in which action is taken to correct discrimination.

5. The Commission's guidelines on agency affirmative action plans are deficient and clearly inferior to similar procedures applicable under Executive Order 11246, as amended, to private employers which are Government contractors. In addition, the Commission's reviews of agency affirmative action plans are inadequate.

a. The Commission's affirmative action guidelines fail to require agencies to conduct adequate analyses for determining if underutilization of minorities and women exists in their work forces, although such a requirement is expected of all Federal contractors under Executive Order 11246.

b. In contrast to Government contractors, Federal agencies are not required to establish goals and timetables for eliminating underutilization of minorities and women. Although the Commission's statistics indicate that serious underutilization of these groups exists in the higher-level positions at most agencies, few voluntarily set goals and timetables for eliminating these disparities. The Commission has failed to issue adequate instructions on the proper development of goals and timetables. Agencies which voluntarily establish objectives appear to set them so low as to preclude the agency from ever eliminating the underutilization which it has identified. At least one agency established a hiring goal which led to a decrease in the percentage of the class whose employment the agency had intended to increase.

c. The Commission fails to require adequate reporting on the effects of affirmative action measures on the employment of minorities and women; as a result, there is little, if any, evidence that affirmative action plans are accomplishing meaningful improvement in the status of these groups.

d. Many agencies fail to submit their affirmative action plans within the time required by the Commission, as well as fail to adhere to the Commission's instructions on conducting assessments of equal opportunity deficiencies. Of 17 national affirmative action plans reviewed, none included adequate assessments. Nevertheless, the Commission approved the vast majority of these plans without ordering any corrective revisions.

6. The Commission is responsible for conducting periodic reviews of agency employment practices to determine compliance with all applicable laws and regulations, including merit system requirements and Title VII. This evaluation program suffers from a number of deficiencies.

a. The Commission evaluates no more than 15 percent of all Government installations per year.

b. The Commission's guidelines for staff conducting evaluations are inadequate. These guidelines do not give instructions for systematic investigation to determine if agency hiring, placement, and promotion practices have a disproportionately adverse impact on minorities and women.

c. A review of reports on 13 such evaluations found that the Commission routinely fails to consider patterns and practices which may constitute systemic discrimination. In addition, when the Commission found discriminatory practices, it failed to order the agency to provide relief to the victims of such discrimination, despite specific authorization to do so in Title VII.

FINDINGS AND CONCLUSIONS

Civil Service Commission (CSC)

Intergovernmental Personnel Act (IPA)

1. CSC is charged by the Intergovernmental Personnel Act of 1970 with the administration of two programs with civil rights implications, administration of the Federal Merit System Standards and the management of a grant program.

a) CSC is responsible for overseeing and coordinating the enforcement of the Merit System Standards' civil rights requirements which bar discrimination on a number of bases, including race, national origin, color, and sex in more than 30 federally-funded programs.

b) With regard to its grant program CSC is responsible for enforcing Title VI of the Civil Rights Act of 1964 which prohibits Federal grant funds from being used in a discriminatory manner on the basis of race, national origin, or color.

2. CSC's Bureau of Intergovernmental Personnel Programs (BIPP), which is responsible for discharging the agency's responsibilities under the IPA, has no full-time civil rights specialists, either in the central office or in the regions. BIPP has also not developed an accurate system for determining how much time its staff spends on civil rights matters.

3. CSC's regulations for administration of the Merit System Standards are not precise enough to ensure adequate enforcement of the civil rights requirements of the Standards.

a) Although the regulations require the adoption of affirmative action plans to ensure equal employment opportunity, they fail to specify what the plans should contain and they do not designate a format for the plans.

b) While the regulations require that compliance reviews be conducted of recipients' employment practices, they do not define what constitutes a compliance review nor do they require regional staff to review a specific percentage of agencies subject to the Merit System Standards.

c) CSC's regulations require that, where there is a lack of substantial conformity with the Merit Standards which cannot be resolved by negotiation, CSC must notify Federal grantor agencies of its findings and recommend that grant termination proceedings be initiated. Although the regulations do not define the term "substantial conformity," they imply that mere noncompliance would not be sufficent for CSC to recommend fund termination.

4. The booklet on affirmative action provided by CSC to governmental agencies covered by the Merit System Standards is too vague and general to be of assistance in promoting effective equal employment opportunity actions by State and local governments. The booklet's standards for developing affirmative action plans are less satisfactory and comprehensive than the standards applied to Federal contractors by the Office of Federal Contract Compliance of the Department of Labor.

a) CSC's guidelines on affirmative action do not clearly require State and local governments developing affirmative action plans to conduct utilization analyses to determine in which occupations, if any, minorities and women are underutilized.

b) CSC's guidelines do not require that affirmative action plans be developed for a specific time period nor do they establish precise time periods during which the plans' goals should be revised and updated.

c) CSC does not require the use of goals and timetables in all instances of underutilization of minorities and women in State and local government work forces.

5. CSC guidelines for conducting compliance reviews of State and local government agencies pose questions, some of which are quite vague, for the reviewer's consideration, but the guidelines do not inform the reviewer what constitutes an acceptable response to the questions, nor do they contain instructions on what actions should be required if responses to the questions indicate noncompliance with equal employment opportunity regulations.

6. CSC has not developed any testing or employee selection guidelines for State and local governments.

7. CSC does not require State and local agencies to file equal employment opportunity compliance reports although it does receive from grant-aided agencies a report which could be used for that purpose.

8. In fiscal year 1974 BIPP staff conducted 502 compliance reviews of the more than 3,000 State and local agencies covered by the Merit System Standards, but these reviews were deficient in a number of respects.

a) CSC has not developed detailed instructions on how to conduct such reviews.

b) Reviewers frequently failed to address all substantive matters impacting on equal employment opportunity such as test validation and the special problems of non-English-speaking persons.

c) The equal employment opportunity recommendations made by CSC regional staff were often weak or too general to effectively secure prompt compliance.

9. Because of their interpretation of a specific statutory provision of the IPA, CSC staff do not investigate complaints alleging violations of the civil rights requirements of the Merit System Standards, but they do require States to establish appeals systems as required by the Merit System Standards. However, an evaluation conducted by CSC late in fiscal year 1974 indicated that such systems did not appear to be effective and that there was possible widespread nonconformity with the appeals system requirement of the Merit Standards in a number of States.

10. CSC's enforcement of the Merit System Standards' equal employment opportunity provisions has not been balanced. When CSC found continuing violations of law in the course of its reviews, it did not initiate enforcement action; rather it merely repeated the same recommendations it made previously. Moreover, in one instance in which CSC has threatened enforcement action; it was objecting to a plan by the State of Michigan which was calculated to increase the number of minorities and women in the State work force and which appeared to be within the parameters of Title VII case law.

11. CSC's Title VI regulations lack provisions banning discrimination in the selection and staffing of advisory and planning boards, councils, and commissions, which play a significant role in determining how IPA grant funds should be distributed.

12. CSC has developed supplemental regulations covering the IPA grant program which are broader than its Title VI regulations since the supplemental regulations prohibit discrimination on bases which are not covered by Title VI such as sex and political affiliation. The supplemental regulations are also applicable to the employment practices of agencies

administering IPA grants.

13. The Title VI regulations permit persons to file discrimination complaints on their own behalf or for a specific class of persons while the supplemental regulations do not authorize class action complaints.

14. Neither the Title VI regulations nor the supplemental regulations require written affirmative action plans from recipients or State or local agencies administering IPA grants.

15. CSC has developed for its regional staff equal employment opportunity guidelines and a checklist for determining compliance with the equal employment opportunity requirements of its IPA grant program. However, these documents are inadequate.

a) The guidelines do not require that compliance reviews be made onsite.

b) The checklist consists of questions which are phrased in such a way as to generate monosyllabic written responses and therefore do not convey sufficient information concerning the equal employment opportunity aspects of the program.

c) The checklist also fails to address specific employment policies which have significant equal employment opportunity implications such as maternity leave benefits and upward mobility programs.

d) The checklist does not require personnel conducting the review to secure or evaluate essential personnel documents such as employment application forms or employee grievance procedures.

16. Compliance reviews conducted of IPA grants by CSC personnel contained some significant deficiencies.

a) CSC investigators did not always furnish all the information requested by CSC's equal employment opportunity checklist.

b) CSC investigators made inadequate recommendations for corrective action.

17. In the only two complaints it has received under the IPA grant program CSC has abdicated its civil rights responsibility by its failure to investigate the complaints or conduct compliance reviews of the two programs involved.

18. CSC has not adequately publicized the right of beneficiaries to file discrimination complaints with it under the IPA grant programs.

FINDINGS AND CONCLUSIONS

Department of Labor

Office of Federal Contract Compliance (OFCC)

1. Executive Order 11246, as amended by Executive Order 11375, requires the Secretary of Labor to administer and oversee an extensive program to eliminate employment discrimination on the basis of race, creed, color, sex, or national origin by Federal contractors, subcontractors, and construction contractors working on Federal and federally-assisted construction projects. The Executive orders also require that contractors and subcontractors take affirmative action to assure that equal employment principles are followed at all of their facilities. The Secretary has delegated this authority to the Office of Federal Contract Compliance (OFCC) within the Department of Labor. OFCC has, pursuant to the Executive orders, delegated authority to 17 contracting Federal agencies to enforce the Executive order regulations under its general direction and control.

2. OFCC's position within the Department of Labor and its staffing appear to be inadequate for fulfilling its role. OFCC is three steps removed from the Secretary in the departmental hierarchy and has no line authority over personnel in the Department's regional offices. OFCC's budget and staff amount to only a small fraction of the resources allocated the compliance activities of the agencies which it is responsible for coordinating.

3. OFCC has issued a series of regulations requiring that most Federal contractors establish affirmative action programs and

specific nondiscrimination guidelines. Although in many respects adequate, these regulations nevertheless suffer from some important deficiencies.

a. The regulations exempt those facilities of State and local governments, other than educational and medical institutions, which are not directly engaged in work on a Federal contract. In addition, OFCC has exempted altogether contractors with contracts valued at less than $10,000.

b. According to OFCC regulation "Revised Order No. 4," all larger contractors, with the exception of construction contractors, must maintain a written affirmative action plan. Revised Order No. 4 requires these contractors to conduct an analysis of their utilization of women and minorities in their work forces and to develop numerical goals and timetables designed to eliminate any identified disparities. The contractor must make good faith efforts to meet these goals by implementing affirmative action measures. The regulation fails to include sufficiently clear instructions on the proper development of goals and to require separate analyses and goals for different minority groups or for men and women within minority groups.

c. OFCC requires all contractors covered by Revised Order No. 4 to identify and provide relief to members of an "affected class," or incumbent employees who continue to suffer the present effects of past discrimination. Despite strong precedent under Title VII of the 1964 Civil Rights Act requiring that affected class members be afforded such relief as back pay and revised seniority systems, OFCC has failed to instruct contractors that this form of affected class relief is required under the Executive orders.

d. OFCC has excluded from the requirements of Revised Order No. 4 all construction contractors. Instead, OFCC has established in some 60 geographic areas voluntary or hometown plans which require the individual contractor to establish or adhere to goals and timetables. In less than 10 additional areas, OFCC imposed plans which set specific affirmative action requirements on the individual contractor. Construction contractors outside these geographic areas are subject to no OFCC requirements. OFCC has failed to require the inclusion of goals for women in either type of plan, although serious underutilization of women exists in the construction industry.

e. OFCC has issued special regulations governing contractors' obligations with regard to employee testing and other selection procedures, sex discrimination, and discrimination based on religious affiliation or national origin.

(1) These special regulations, with the exception of those concerning sex discrimination, set reasonably adequate standards and are consistent with equivalent guidelines issued by the Equal Employment Opportunity Commission (EEOC).

(2) OFCC's Sex Discrimination Guidelines are inferior to those issued by the EEOC and are seriously deficient. They fail to require contractors to treat maternity as a temporary disability and do not prohibit mandatory maternity leave policies or fringe benefit policies having a discriminatory effect on women. Moreover, they permit discrimination on the basis of sex where sex is alleged to be a "bona fide occupational qualification" (BFOQ), although such an exemption is not included in the Executive orders. OFCC also fails to stipulate that the BFOQ exception must be strictly construed, despite judicial precedent narrowly interpreting the exception under Title VII.

4. OFCC has failed to exercise its authority under the Executive orders to require contractors to report all information necessary for

determining compliance. Reporting requirements applicable to supply and service contractors exclude small contractors and fail to elicit information necessary for determining compliance, such as specific affirmative action measures taken by the contractor and data showing the extent to which the contractor is meeting its promised objectives. Similarly, the OFCC reporting system does not permit a determination of the compliance status of construction contractors, since it does not apply to their total work force.

5. OFCC, as manager of the contract compliance program, is charged with setting resource guidelines and priorities for the compliance agencies. There are a number of important deficiencies in the system which OFCC has established.

a. OFCC has delegated authority over contractors to agencies according to industrial codes. Since many companies may fall into several code classifications, different agencies may assert jurisdiction over the same contractors. This system apparently leads to duplication of effort and inconsistencies in the treatment of the same contractor by different agencies.

b. Although OFCC regulations require that agency compliance programs be headed by officials under the immediate supervision of the agency head, in fact, programs in most agencies appear to be managed by far more subordinate officials.

c. In spite of assurances to Congress in 1971, OFCC has continued to permit vast disparities in the relative resources allocated to agency compliance programs. Agency compliance staffs and budgets vary widely and bear little relationship to the size of the agency workloads. Agencies with better staffing and funding tend to review a greater proportion of the contractors for which they are responsible. However, agencies as a whole review only a small percentage of all contractors subject to the Executive orders and in 1974 conducted only slightly more than a quarter of the number of reviews on which their budget and staffing were based.

6. OFCC has failed significantly in carrying out its responsibility for overseeing and guiding the contract compliance program covering supply and service contractors, which employ the vast majority of workers protected by the Executive orders.

a. Although OFCC regulations have required agencies since 1971 to conduct regular reviews of supply and service contractors, OFCC failed to issue final guidelines on the conduct of such reviews until 1974. These compliance review guidelines are fundamentally deficient, since they do not provide for a determination of the contractor's performance in meeting its promised affirmative action objectives or in affording relief to members of affected classes.

b. OFCC has failed to monitor agency performance in conducting compliance reviews and approving affirmative action plans. During fiscal years 1973 and 1974 OFCC reviewed less than one percent of the affirmative action plans approved by agencies and participated in a much smaller percentage of the compliance reviews conducted by the agencies during the same period of time.

c. In 1974, OFCC developed a new monitoring procedure which requires agencies to submit reports to it upon the completion of each compliance review and prior to approving an affirmative action plan. However, in fiscal year 1974, reports were submitted for less than half of all reviews conducted, and the overwhelming majority of the reports failed to comply with OFCC's requirements.

d. When an agency violates Executive order regulations, OFCC is authorized to order the agency to take specific action, to revoke the agency's jurisdiction over a particular contractor, or to remove the agency's entire compliance responsibility. OFCC has failed to use this authority.

(1) OFCC determined that each of the plans audited during 1973 was approved by a compliance agency in violation of Executive order regulations. OFCC took no action with regard to most of these plans and in two cases in which it made recommendations to the compliance agencies, the deficiencies apparently were not corrected.

(2) Since 1969, OFCC has assumed jurisdiction over a contractor in two instances, both of which occurred only after the compliance agency had engaged in protracted negotiations resulting in deficient settlements and only after OFCC had been notified by other Federal agencies of the need to correct the deficiencies.

(3) OFCC has never removed an agency's entire compliance authority over supply and service contractors for violations of its regulations, despite strong indications that compliance agencies, such as the Department of Health, Education, and Welfare, the Department of the Treasury, and the General Services Administration, routinely commit violations.

7. OFCC has failed to establish an effective enforcement program covering construction contractors.

a. OFCC has obstructed efforts by other authorities to secure affirmative action commitments in the construction industry. It has consistently opposed efforts by compliance agencies to secure affirmative action plans from construction contractors in nonplan areas, and it has issued regulations limiting the right of State and local governments to require goals of construction contractors in hometown plan areas, despite three court decisions upholding local requirements.

b. OFCC has failed to set standards for compliance agencies in enforcing the Executive orders with regard to construction contractors.

c. Audits conducted by OFCC in 1973 of hometown and imposed plans indicate widespread failures by construction contractors and participating trade unions to meet established goals for placing minority workers. Almost three-quarters of the audited hometown plans fell short of the promised objectives and in approximately two-thirds of these instances, OFCC failed to take any action. Similar audits conducted of contractors in imposed plan areas found that contractors failed to meet their goals in 40 percent of the instances.

8. OFCC has failed to assure that sanctions be imposed for violations of the Executive orders. Sanctions authorized by the Executive orders include cancellation or termination of existing contracts or debarment from additional contracts, prohibiting the award of a contract, and withholding progress payments. In the 10 years of the contract compliance program, despite widespread noncompliance, only nine companies have been debarred. OFCC does not know how many times contract awards have been prohibited, and the sanction of withholding progress payments has never been imposed.

Chapter 4

FINDINGS AND CONCLUSIONS

Department of Labor (DOL)

Equal Pay Act (EPA)

1. The Equal Pay Act, which amended the Fair Labor Standards Act of 1938, is designed to eradicate sex-based wage discrimination in jobs where men and women perform substantially equal work and is enforced by the Department of Labor. Although the Secretary of Labor is ultimately responsible for enforcement of the Act, actual authority for its implementation has been delegated to the Employment Standards Administration's Wage and Hour Division, which is under direction of the Wage and Hour Administrator.

2. The Department of Labor enforces a number of laws such as the Davis-Bacon Service Contract Act, the Age Discrimination in Employment Act, and the EPA. The enforcement of these laws has been decentralized and delegated to DOL regional offices. This organizational structure has created enforcement problems.

a. Although the Wage and Hour Administrator is responsible for overall enforcement of the EPA, he or she has no line authority over regional staff.

b. There have been inadequate efforts to monitor regional enforcement of the Act, in part because flow of information from regional offices to the Administrator is insufficient.

c. As a result of the inability of the Administrator to exercise management control over regional activities, it has been impossible to develop a national enforcement program.

3. In late 1974, there were only 979 DOL compliance officers who, as one of their responsibilities, investigated matters arising under compliance with the Equal Pay Act. Despite the fact that EPA coverage has been broadened since 1963 to cover a large number of employees originally exempt from the Act, such as those with professional, technical, or administrative positions and State and local government employees, the number of compliance officers has not increased significantly beyond 1963 levels.

4. Regional compliance staff are responsible for the enforcement of a number of statutes, one of the most complicated of which is the EPA; nevertheless, there are no senior grade specialists in EPA matters in field offices.

5. DOL's equal pay enforcement policies are contained in its Interpretative Bulletin. Specific guidance and requirements for compliance officers is contained in the Field Operations Handbook, part of which is in the public domain. The positions adopted by DOL in these documents raise substantive questions and are not adequate to explain fully the requirements of the Act.

a. In the area of fringe benefits, DOL has ruled that employers will have satisfied the requirements of the Act concerning pension plans as long as either employer contributions to the plan or employee benefits from the plan are equal for men and women, although the result of the former may be lower benefits for women. This policy is contrary to the position of the Equal Employment Opportunity Commission, which requires that pension plan benefits must be equal for both sexes.

b. DOL has adopted such a narrow interpretation of wages in the Bulletin and the Handbook that it exempts maternity benefits from the scope of the Act although these benefits, like pension rights, are derived as a direct result of employment. Such a position is inconsistent with the policies of the Equal Employment Opportunity Commission.

c. In the Interpretative Bulletin, DOL has provided employers with guidance concerning training benefits which is contrary to judicial interpretations. The Bulletin gives the clear impression that there may be cases in which training programs are permitted to discriminate on the basis of sex.

d. The Bulletin does not provide adequate guidance with regard to matters relating to employees covered under the Act by the 1972 and 1974 amendments. The coverage of State and local government employees and employees in administrative, technical, and professional positions presents unique and complex questions which are not covered in the Bulletin; and the failure to fully explain these areas has impeded the settlement of outstanding cases.

e. The Bulletin provides no adequate definition of what constitutes a bona fide merit or seniority system.

6. Equal pay investigations may be started by the filing of a complaint (written or anonymous) or by DOL on its own initiative.

a. Where a DOL investigator believes no violation exists, no substantive information is maintained in the file. This procedure makes it extremely difficult for anyone examining the investigative file to judge properly the sufficiency of the investigator's decision or the adequacy of the investigation.

b. DOL's instructions to its compliance officers do not require them, in the case of a DOL-initiated investigation, to notify employees that it is conducting an equal pay compliance investigation. Employees, thus, may be unaware that a DOL investigation is underway. However, if a violation [illegible] uncovered, these same employees will be asked to accept or reject the DOL-approved settlement, possibly without having been able to participlate in or contribute to it.

c. Although DOL maintains that an employee or employer who is dissatisfied with a DOL finding may appeal that finding, it has no regulations pertaining to an appeals process and neither employers nor employees are generally advised of the availability of an appeal right.

d. An examination of DOL investigative files revealed that there is no consistent pattern for followup reviews.

e. Although compliance officers are required to report possible violations of other Federal laws prohibiting sex discrimination, they have consistently overlooked such possible violations.

f. While an examination of a small number of EPA investigative files by Commission staff indicated that they contained sufficient infor- upon which to base a compliance determination, the investigations, according to the staff of the DOL Solicitor, have failed to include sufficient documentation for litigative purposes. Moreover, the EPA investigations have been criticized by women's groups as being inadequate.

7. While the Equal Pay Act seeks to prohibit sex-based wage discrimination, which is a highly specific form of sex discrimination, there are other Federal agencies which administer Federal laws which prohibit all forms of sex discrimination, including the type prohibited

by the Equal Pay Act.

a. DOL has rarely been requested by other Federal agencies to provide explicit guidance concerning equal pay policy formulation.

b. In only a few instances has DOL referred any non-equal pay, sex discrimination violations of other Federal laws to other agencies for enforcement.

c. There is no consistent pattern of coordination between DOL field staff and the field staffs of other agencies having similar jurisdiction, although such coordination could serve to maximize the utilization of personnel resources and minimize the costs of enforcement.

FINDINGS AND CONCLUSIONS

Equal Employment Opportunity Commission (EEOC)

1. The Equal Employment Opportunity Commission is the Federal agency responsible for enforcing the provisions of Title VII of the Civil Rights Act of 1964 prohibiting employment discrimination by private employers, State and local governments, labor organizations, joint apprenticeship committees, and employment agencies. It enforces the Act primarily by investigating charges of employment discrimination, attempting conciliation of these charges, and, where conciliation attempts fail, bringing civil lawsuits against allegedly discriminatory parties.

2. EEOC has issued guidelines on discrimination based on sex, national origin, religion, and on testing and selecting employees. These guidelines, particularly those relating to sex discrimination and testing and selecting employees, are the most broad and complete set of guidelines issued by a Federal agency.

3. EEOC's organizational structure has hampered its ability to operate efficiently. With the exception of the Chairman, the EEOC Commissioners have few definable responsibilities. The Chairman, who should be the policy-making head of the agency, has in the past had many administrative responsibilities, and the Executive Director, who should be the administrative head, has not had sufficient administrative authority.

4. EEOC has been staffed in the past far below its authorized level. In the Office of the General Counsel, failure to fill staff positions expeditiously resulted in undue delays in the filing of lawsuits, as well as a low overall number of suits.

5. EEOC collects data on the racial, ethnic, and sex makeup of the work force under its jurisdiction. It makes inadequate use of this information in its own enforcement process, however, and because of Title VII's requirement of confidentiality, it is not made available to the public. The result is that employees and private citizens are hampered in their efforts to assist the Government in monitoring employers' compliance with Title VII and other antidiscrimination laws.

6. Although since March 1972 EEOC has had jurisdiction over State and local governments and has received a substantial number of charges against them, the agency has yet to attach any priority to their processing. Similarly, although employment agencies are a major source of job applicants for many employers, EEOC has given little priority to enforcement actions against them.

7. Despite a recent upgrading of its staff training program, EEOC's pre-investigative analysis process is inefficient and inadequately staffed. The number of incoming charges is often miscounted and charges are not consolidated in accordance with the agency's policies.

8. EEOC's investigations have been generally inadequate for litigative purposes. Attorneys in the Office of the General Counsel have found investigation files so lacking in documentation that most cases referred to them for suit have been either rejected or have required further investigation.

9. Title VII provides that EEOC send notices to complainants indicating that they have the right to bring private suits after their charges have been pending more than 180 days without successful conciliation. In practice, EEOC does not issue these right-to-sue notices unless they are requested, regardless of the length of time involved. By not systematically issuing these notices at the expiration of 180 days, EEOC is not only disregarding Title VII, but it is denying complainants an alternative to its lengthy administrative process.

10. The effectiveness of EEOC's conciliation agreements is unmeasured because compliance with them has not been systematically monitored. Until fiscal year 1974, monitoring of conciliation agreements was practically nonexistent. Since then it has been minimal, and although violations have been uncovered, in no case has EEOC sought to enforce a conciliation agreement in court.

11. As of June 30, 1974, EEOC had a backlog of approximately 98,000 charges which was increasing rapidly. As a result, the median period of time required for the resolution of a complaint, from receipt to final resolution, was 32 months. The reason for the backlog is that EEOC field staff has not been able to keep up with the rate of incoming charges. In the past year, the staff production rate was apparently improved somewhat, but the backlog remains EEOC's major administrative problem.

12. In an effort to deal with the backlog, EEOC adopted a Resource Allocation Strategy under which charges against major national and regional respondents are consolidated for processing. While this process has been implemented at the headquarters level against national respondents, the strategy has failed to materialize at the regional level.

13. EEOC has increased its efforts against systemic discrimination by creating a National Programs Division, which has initiated investigations of major national employers and unions against whom large numbers of complaints are pending.

14. EEOC obtained the authority to bring civil suits in March 1972. With only 290 direct lawsuits having been filed as of March 1975, however, the agency's litigative effort has yet to gain full momentum. As of March 1974, the average EEOC attorney was operating at only one-fifth of his or her prescribed caseload. Further, the few cases which have been filed have not concentrated on the larger respondents or industry leaders. In March 1974, EEOC received the exclusive power to bring suits alleging patterns or practices of discrimination, a power formerly shared with the

Department of Justice. Yet, as of March 1975, only one pattern or practice suit had been filed by EEOC. Considering that EEOC has one of the largest legal staffs in the government, this situation is deplorable.

15. EEOC Commissioners are empowered to file charges on their own initiative. Although the Commissioner Charge is potentially useful for initiating investigations of respondents against whom few charges have been received, such as employment agencies, the Commissioners have failed to use it for this purpose. In fact, the filing of the Commissioners Charges has been sporadic, ranging from 38 in fiscal year 1973 to 197 in fiscal year 1972.

16. EEOC has obtained broad consent decrees with the American Telephone and Telegraph Company (AT&T) and the steel industry which are commendable for their scope, in terms of dollars and numbers of employees affected. The AT&T agreement, however, suffers from insufficient monitoring and followup, and the steel industry decree has been criticized because the affected classes of employees were excluded from the negotiations and it calls for the Government to make an appearance on behalf of the industry, should an employee bring a private suit.

17. Pursuant to Title VII, EEOC defers charges it receives to qualified State and local fair employment practices agencies for a 60-day period. The process has not been productive, however, because the preponderance of these charges are routinely returned by the agencies, unprocessed, at the end of the period. EEOC has attempted to induce agencies to process these charges by awarding monetary grants to them. There is little evidence, however, that granting these funds has alleviated EEOC's caseload.

18. Although the objective of EEOC's voluntary compliance program was to obtain 61 voluntary affirmative action agreements with employers, it has obtained only one, and that agreement was highly deficient by EEOC's own standards.

Chapter 6

FINDINGS AND CONCLUSIONS

Equal Employment Opportunity Coordinating Council

1. The Equal Employment Opportunity Coordinating Council was established by the 1972 Amendments to Title VII of the 1964 Civil Rights Act to promote coordination and eliminate inconsistencies in the operations of Federal agencies having equal employment enforcement responsibilities. The Act provides that the Council be composed of the Secretary of Labor, the Attorney General, and the heads of the Equal Employment Opportunity Commission (EEOC), the Civil Service Commission (CSC), and the United States Commission on Civil Rights. The provision establishing the Council was the result of a legislative compromise arising out of previous proposals to transfer the equal employment responsibilities of the CSC and Office of Federal Contract Compliance within the Department of Labor to the EEOC.

2. The Council has no authority for making its decisions binding on the agencies represented in its membership.

3. The Council's ability to carry out its statutory purpose has been impaired not only by its lack of enforcement authority, but also by its lack of a permanent staff and by the infrequency with which it has met.

4. During the three years of its existence, the Council has dealt in depth with only one issue: the question of Federal requirements for validating tests and other employee selection standards. Despite its continued consideration of this matter, the Council has failed to resolve serious differences among the agencies. Draft guidelines on testing, which

were being considered in late 1974, excluded a number of important provisions contained in EEOC's guidelines which have already been upheld by Federal courts.

5. As a result of the Council's preoccupation with the testing issue, it has failed to deliberate and reach resolution on such important questions as uniform data collection procedures, joint training programs, coordinated investigations, or consistent standards governing affirmative action and nondiscriminatory employment practices.

6. The few instances of coordination among the agencies which have occurred since 1972, such as joint decrees with employers, took place outside the Council and represented merely a continuation of the ad hoc attempts at coordination which the agencies made prior to the establishment of the Council.

7. There are a number of agencies which have some responsibility for ensuring equal employment opportunity, such as the Department of Health, Education, and Welfare and the Federal Communications Commission, but which are not members of the Council, and practically no attempts have been made by the Council to coordinate the activities of those agencies.

GENERAL RECOMMENDATIONS

We believe that it is of great importance that within the next year the President propose and the Congress enact legislation consolidating all Federal equal employment enforcement responsibility in a new agency, the National Employment Rights Board, with broad administrative, as well as litigative, authority to eliminate discriminatory employment practices in the United States. In order to accomplish this end we recommend the following:

I. A National Employment Rights Board should be established which is vested with the authority for enforcing one Federal statute protecting citizens from employment discrimination on the basis of race, color, religion, sex, national origin, age, and handicapped status. To achieve this end, the following existing statutes and Executive orders should be rescinded or modified:

A. Title VII of the 1964 Civil Rights Act should be amended as follows:

1. The basic substantive provisions of Title VII, Sections 703 and 704, shall be preserved, with age and handicapped status added as covered classes, and authority for enforcing these provisions with regard to all employers currently covered by the statute in Section 701, including State and local governments and the Federal Government, shall be vested in the National Employment Rights Board.

2. Sections 705, 707, and 717, establishing the Equal Employment Opportunity Commission and granting that agency, the Attorney General, and the Civil Service Commission enforcement authority shall be rescinded. The resources allocated to enforcement of Title VII should be assigned to the National Employment Rights Board.

3. The court enforcement procedures contained in Sections 706(a) through f(2), Section 707 and 717(c) shall be rescinded. The provisions governing Federal district courts' jurisdiction and handling

of Title VII cases should be preserved.

4. Section 712, which exempts veterans perference rights from the statute's coverage, and Section 715, which establishes the Equal Employment Opportunity Coordinating Council (EEOCC), shall be rescinded.

B. The Equal Pay Act of 1963 should be rescinded and the resources allocated to enforcement of this statute assigned to the National Employment Rights Board.

C. The provision of the Rehabilitation Act of 1973 which requires affirmative action by Federal contractors with regard to the employment of handicapped individuals and the Age Discrimination in Employment Act of 1967 should be rescinded and the resources allocated to enforcement of these statutes assigned to the National Employment Rights Board.

D. Executive Orders 11246, 11375, and 11478 should be rescinded and the resources allocated to enforcement of these orders assigned to the National Employment Rights Board for the purpose of monitoring adherence to Title VII.

E. Similarly, those resources now utilized by Federal agencies to monitor compliance with other laws, regulations, or rules prohibiting employment discrimination on the basis of race, color, religion, sex, national origin, age, or handicapped status should be assigned to the Board.

F. Those sections of the United States Code requiring Federal personnel practices which have a discriminatory effect on the protected classes should be rescinded or amended.

1. The provision requiring a perpetual preference for veterans shall immediately be modified to reduce its discriminatory impact on women. In addition, the provision restricting selection of candidates to only the top three ranked candidates (the "rule of three") shall immediately be amended to permit Federal hiring officials to select from a wider range of qualified candidates.

2. The National Employment Rights Board shall be directed to conduct an analysis of all statutory Federal personnel practices to identify other provisions which are inconsistent with Title VII and to make recommendations to Congress for

additional legislation to eliminate or amend such provisions.

II. The National Employment Rights Board should be vested with broad administrative and litigative authority to enforce Title VII, with primary emphasis on eliminating patterns and practices of discrimination rather than resolving individual complaints.

A. The Board should be authorized to initiate enforcement procedures whenever it has cause to believe Title VII has been violated. Board action should not be conditioned on the filing of complaints by individuals or other third parties.

B. The Board should be given cease and desist authority, with final orders reviewable in Federal courts of appeals according to the Administrative Procedure Act. The Board's cease and desist authority should include the authority to order all equitable relief, including back pay, and affirmative action, including goals and timetables, necessary for effectuation of the Act.

C. The Board should also be given the authority to bring suit in Federal district courts where the Board certifies that it has cause to believe Title VII has been violated and that court enforcement better serves the purposes of the Act. Where violations of the Act are found, Federal district courts should have the same broad equitable powers currently granted under Title VII.

D. The Board should be given the authority to intervene, on behalf of alleged discriminatees, in private actions brought under the Act.

E. The Board should have final authority to order the debarment of any Federal contractor or subcontractor, the termination of any Federal grant, the decertification of any labor union, and the revocation of any Federal license. Such action would be authorized when there has been a failure to comply with a Board order within 90 days of the order or, in the case of appeal, within 90 days of court affirmance of a Board order.

F. The Board should be vested with broad investigative powers, including subpoena powers and the authority to institute regular reporting requirements for collecting any information relevant to compliance with the Act. All information collected by the Board in the course of its proceedings, with the exception of trade secrets, should be available to the public.

III. The Board's primary purpose and responsibility should be the elimination of discriminatory employment practices affecting large classes of persons. To carry out this objective, the following steps should be taken:

A. The Board should allocate more than 50 percent of its resources to investigating, adjudicating, or litigating matters involving patterns and practices of discrimination.

B. The Board should develop a procedure for expeditiously requiring those covered by Title VII to correct discriminatory employment patterns. This procedure would include the systematic identification of employers, labor organizations, and employment agencies whose work force, membership, or referral statistics show such a disparity in the utilization of minorities and/or women as to constitute a prima facie violation of Title VII, as defined by the courts. The Board should send notices to those identified requiring the submission of evidence demonstrating that the disparities are not the result of discriminatory practices or evidence of corrective actions taken to eliminate the disparities. If the Board determines that such evidence does not rebut the prima facie violation, it should immediately issue an order requiring corrective remedies, including the adoption of goals and timetables. Similarly, the Board should develop regular procedures for identifying systemic discrimination on the basis of age and handicapped status, and where appropriate orders should be issued requiring corrective actions. All such orders would be legally binding unless the employer requests a hearing within

30 days after receipt of the order. Where such orders are entered against Federal agency installations the Civil Service Commission should be delegated responsibility for monitoring agency compliance with the order, subject to the Board's directives.

IV. Although the Board's primary responsibility should be to eliminate discriminatory employment practices and not to resolve individual complaints, it should have the authority to receive and act on individual grievances. In order to adequately protect individuals alleging discrimination, the following provisions should be made:

A. Individual charges of discrimination should be deferred to approved State and local fair employment practices agencies, the findings of which should be given substantial weight by the Board. Complainants should be permitted to file objections to local agency findings.

B. The Board should approve only those State and local agencies which enforce statutes affording at least the same protections as Title VII and in a manner consistent with the Board's policies, which should be set forth in published guidelines. Moreover, the Board should periodically evaluate each agency to which it defers to ensure that the work product of the agency is consistent with the guidelines.

C. In order to promote adequate enforcement by State and local agencies, the Board should be appropriated sufficient funds to subsidize such agencies according to the number of Title VII cases processed.

D. Complaints against Federal installations should be deferred to the Civil Service Commission for investigation pursuant to the guidelines of the Board, and the Board should periodically review the Commission's complaint processing to ensure that it conforms with the Board's standards.

E. Individuals should be allowed to request and receive a notice of the right to sue in Federal district court within 90 days of filing a charge with the Board. The

Board should automatically issue notices to complainants 180 days after the filing of a charge granting the right to sue. Complainants should be allowed to file a civil action within 18 months of receipt of such notice. In addition, the Board should establish procedures to assist complainants in obtaining counsel.

E. The Congress should establish a revolving fund, to be administered by the Board, for defraying the expenses of plaintiffs' attorneys prior to a court determination on any award of attorneys' fees and costs.

V. The Board should be established as an independent agency with the structure and resources necessary for accomplishing its purposes.

A. The Board should consist of seven persons appointed by the President and confirmed by the Senate for six-year terms, subject to removal by the President only for cause. No more than four Board members should be affiliated with one political party.

B. The Chairperson of the agency should be appointed by the President for a four-year term.

C. The General Counsel of the Board should be independent, appointed by the President, and confirmed by the Senate for a six-year term and subject to removal by the President only for cause.

D. The Executive Director of the Board should be appointed by all Board members.

E. The National Employment Rights Board should be provided with the staffing necessary to carry out its functions. It should be given, at a minimum, resources equivalent to one and a half times those currently allocated to the enforcement of laws, Executive orders, regulations, and rules prohibiting employment discrimination.

RECOMMENDATIONS

Civil Service Commission

We recommend that the President issue an Executive order directing the Civil Service Commission, within six months, to change its current operations to ensure that the Federal Government adheres to the same equal opportunity and affirmative action standards as are applicable to other employers. The Executive order should state that in implementing the recommendations set forth below the Commission's actions will be subject to the approval of the Equal Employment Opportunity Commission (EEOC).

1. The Commission should take steps to ensure that all employee selection methods used by the Federal Government conform to Title VII standards, as delineated by the Equal Employment Opportunity Commission.

a. The Commission should begin immediately to conduct analyses of all Federal selection procedures having an adverse impact on women and minorities to determine whether the standards applied for hiring, placement, and promotion can be demonstrated empirically to be related to job performance and to lack cultural and/or sex bias. Further, even if discriminatory standards are shown to have empirical validity, they must not be used unless the Commission demonstrates that less discriminatory selection standards are inapplicable.

b. The Commission should undertake this analysis in coordination with the Equal Employment Opportunity Commission and independent experts in the field of selection standards validation. The Commission should make public all reports of its analyses.

c. The Commission should recommend to Congress legislation to remove any limitations on its ability to eliminate discriminatory selection standards.

(1) The Commission should recommend to Congress the

serious modification in the law requiring preferential treatment of veterans needed to reduce its extremely discriminatory effect on women by providing that veterans preference in Federal employment be available to individuals on a one-time basis only within five years after discharge from the service.

(2) The Commission should recommend to Congress elimination of the "rule of three," to permit hiring officials to select from a wider range of candidates, since current ranking and testing procedures are unreliable and may unjustifiably screen out qualified minorities and women.

d. The Commission should adopt rules permitting agencies to make race, ethnicity, or sex a criterion of selection when hiring or promoting individuals in accordance with an affirmative action plan designed to eliminate underutilization of minorities and women. Underutilization shall be considered resolved at the point at which there is representation equivalent to the numbers in the available work force.

2. The Commission should issue completely revised complaint procedures which provide Federal employees charging discrimination a full and fair proceeding consistent with Title VII standards.

a. The Commission should adopt the same procedures governing the filing of charges as those used by EEOC, allowing complainants to allege continuing discrimination, providing for less strict time limitations, and treating within the scope of the initial complaint all issues like and related to the specific allegation made by the individual.

b. All complaints should be processed according to the same procedures, regardless of whether they allege a particular act of discrimination or systemic discrimination against an individual or a class.

c. The informal counseling period should be made optional, since it serves to delay the formal proceeding.

d. The Commission should provide on request free legal assistance to complainants of all grades.

e. All investigations should be conducted by an independent office within the Commission according to investigation procedures consistent with Title VII standards.

(1) The Commission should establish an office of investigations with investigators trained in employment discrimination matters.

(2) The Commission should adopt investigation procedures designed to cover all forms of discrimination, including employment practices which have a disparate impact on minorities and women. In establishing these procedures, the Commission should consult with the EEOC and the Wage and Hour Division of the Department of Labor.

f. Complainants should be given the right to obtain all information relevant to the complaint or relevant to the obtaining of information bearing on the complaint. The standard of relevance should be that contained in Rule 26 of the Federal Rules of Civil Procedure. Agency denials of requests for information should be appealable to hearing examiners.

g. All hearings should be conducted before independent hearing examiners according to procedures adequate for protecting Title VII rights.

(1) Certification of hearing examiners should be based on demonstrated expertise in Title VII law.

(2) Hearing examiners should be reimbursed by the Commission rather than by the accused agency.

(3) Complainants should be given the right to subpoena witnesses and documentary evidence.

(4) Any agency official accused in a complaint should be given the right to participate in the proceeding on the complaint as a party in interest.

(5) While strict rules of evidence should not be applied so as to handicap complainants unskilled in the law, nevertheless, all evidence which would be admissible in a court of law considering a Title VII case should be admitted in the administrative hearing.

(6) Substantive Title VII law, as defined by the Federal courts, should be required to be followed.

h. Decisions of hearing examiners should be binding on the accused agency unless reversed by the Appeals Review Board.

i. The Appeals Review Board should apply Title VII precedents in reviewing appeals.

j. The Commission should recommend to the Department of Justice that the Federal Government as defendant in Title VII actions take the position that plaintiffs are entitled to a trial _de novo_.

3. The Commission should adopt affirmative action regulations modeled after Revised Order No. 4 of the Office of Federal Contract Compliance (OFCC) of the Department of Labor so that Federal agencies are required to adhere to affirmative action standards equivalent to those expected of Federal contractors.

a. Agencies should be required annually to conduct thorough analyses of their work forces to identify disparities between the employment of women and minorities in each agency job title and the availability of these groups in the labor market with job-related qualifications. Such analyses should consider each major minority group (for example, blacks, Mexican Americans, Puerto Ricans, Asians, and Native Americans) separately and by sex, as well as nonminority women.

b. Agencies should be required to establish ultimate goals for eliminating any identified disparities and annual hiring and promotion objectives for obtaining these goals.

c. The Commission should require agencies to review annually their ultimate goals and to report annually on the extent to which annual numerical objectives have been accomplished and whether ultimate goals have been revised.

d. Other components of agency affirmative action plans, such as descriptions of training or recruitment programs, should be submitted only every two or three years unless the agency fails significantly to meet its numerical objectives.

4. The Commission should substantially increase the frequency and quality of its evaluations of agency employment practices.

a. The Commission should conduct an evaluation of more than 25 percent of all Federal facilities with more than 100 full-time employees to determine compliance with the requirements of Title VII.

b. Evaluation reviews should include a systematic investigation to determine if agency hiring, placement, or promotion practices have a disproportionately adverse impact on minorities and women.

c. Where such impact is determined, the Commission should identify all individual members of the class affected and should order the agency to provide relief to these individuals in the form of back pay and preferential status for hiring, transfer, or promotion purposes.

RECOMMENDATIONS

Civil Service Commission (CSC)

Intergovernmental Personnel Act (IPA)

1. CSC should employ, at a minimum, one full-time civil rights specialist in each of its smaller regional offices, two full-time civil rights specialists in its larger regional offices, and four full-time civil rights specialists in the Bureau of Intergovernmental Personnel Programs' (BIPP) central office.

2. CSC should issue revised guidelines on affirmative action plans for those agencies covered by the Merit System Standards which incorporate the standards of Revised Order No. 4 developed by the Office of Federal Contract Compliance of the Department of Labor.

3. CSC should require State and local governments to follow the employee selection standards developed by the Equal Employment Opportunity Commission.

4. Rather than discouraging State and local jurisdictions, such as Michigan, which have devised innovative, legitimate plans for correcting imbalances of minorities and women in their work forces, CSC should adopt rules permitting State and local governments to make race, ethnicity, or sex a criterion of selection when hiring or promoting individuals in accordance with an affirmative action plan designed to eliminate underutilization of minorities and women.

5. CSC should issue precise guidelines to regional staff for conducting reviews to determine compliance with the civil rights provisions of the Merit System Standards. These guidelines should explain how to conduct

compliance reviews, delineate areas of possible noncompliance with the Merit Standards, and set forth sample recommendations for corrective actions to remedy violations.

6. The civil rights specialists in the BIPP central office should evaluate at least 50 percent of the compliance reviews conducted by regional civil rights staff to determine their comprehensiveness and effectiveness in documenting violations of the civil rights provisions covering the Merit Standards and the IPA grant program. Recommendations for corrective actions made by regional staff should be analyzed to determine whether they adequately address civil rights violations found during the review and are calculated to bring about prompt and full compliance.

7. The Congress should amend the Intergovernmental Personnel Act to require the Civil Service Commission to investigate and order corrective action with respect to discrimination complaints involving the Merit System Standards.

8. CSC should immediately initiate enforcement action--i.e., the recommendation of fund termination proceedings to Federal grantor agencies--in all instances where it is aware of civil rights violations of the Merit System Standards and where corrective actions have not been undertaken by the State and local governments involved within 90 days after being notified of the violations.

9. CSC should certify within 90 days that all States have an appeals system for processing complaints of discrimination which fully meets the requirements of the Merit System Standards. To the extent that any State remains in noncompliance 90 days after being informed by CSC of the action it must take to come into conformance with the Merit System Standards, CSC should recommend termination of Federal assistance to the State agencies covered by the Merit Standards.

10. CSC should require all State and local agencies subject to its authority to submit compliance reports on an annual basis. These reports should require data

by job title, cross-classified by race, ethnicity, and sex concerning personnel actions, including hires, promotions, resignations, dismissals, transfers, monetary awards, and retirements which have occurred in these State and local agencies.

11. CSC should amend its Title VI regulations to prohibit discrimination in the selection and staffing of advisory and planning boards, councils, and commissions.

12. CSC should amend its supplemental regulations covering the IPA grant program to provide for class action complaints and to require written affirmative action plans from IPA grant recipients.

13. CSC should revise its equal employment opportunity checklist by rephrasing questions so as to avoid single word responses, by expanding the number of employment practices covered by the checklist to include such significant employment policies as maternity leave benefits and upward mobility programs, and by requiring the analysis and evaluation of such essential personnel documents as employment application forms and employee grievance procedures.

14. CSC should investigate all complaints it receives under the IPA grant program.

15. CSC should prepare a pamphlet or flyer for distribution by recipients to beneficiaries of IPA grants informing the beneficiaries of their right to file a discrimination complaint with CSC if they believe they have experienced discrimination in an IPA-funded program. The pamphlets should also be prepared in languages other than English for use in jurisdictions with large non-English-speaking populations.

Chapter 3

RECOMMENDATIONS

Department of Labor

Office of Federal Contract Compliance (OFCC)

1. The President should amend the Executive orders to consolidate the entire contract compliance program in the Department of Labor, and should recommend to the Congress that an Assistant Secretary position be created to direct the program. All of the resources currently allocated to contract compliance programs within the designated agencies should be assigned to the Department of Labor.

2. Until such action is taken, the following steps should be implemented:

a. The Department of Labor should significantly increase the staffing resources allocated to the OFCC and should authorize the Director of OFCC to report directly to the Office of the Secretary.

b. OFCC should consolidate the current delegation of authority in fewer than 10 agencies, assuring that approximately equal responsibility and resources are allocated to each agency compliance program. Resources should be sufficient to permit agencies to review annually at least one-third of the contractors for which they are responsible.

c. OFCC should designate as compliance agencies only those which adhere to OFCC regulations. The authority of agencies such as the Departments of Health, Education, and Welfare; the Treasury; and the General Services Administration, which appear consistently to violate OFCC regulations, should be removed forthwith.

d. OFCC should drastically change its procedures for managing and monitoring compliance agencies.

(1) OFCC should develop a procedure for scheduling compliance reviews which is based on the annual reports recommended below to be required of contractors. In scheduling reviews, priority should be given to reviewing larger contractors whose reports indicate significant underutilization and a failure to achieve previously established, affirmative action numerical objectives.

(2) Compliance agencies should continue to be required to submit reports upon the completion of reviews, but the agency reporting format should be revised to reflect the contractor's performance in obtaining its previously established objectives.

(3) OFCC should audit at least 25 percent of agency compliance reviews and approved affirmative action plans and should participate in at least 10 percent of each agency's onsite reviews.

(4) OFCC should issue a memorandum to compliance agencies affirming that sanctions must be commenced when any violation of the Executive order is discovered. If an agency engages in negotiations with a contractor for more than 30 days after the issuance of a show cause notice without issuing a notice of proposed debarment, OFCC should assume jurisdiction over the contractor and supervise the imposition of sanctions or the conduct of a hearing.

3. OFCC should significantly revise some of its regulations to remove unjustified exemptions and to clarify the Executive order's requirements, regardless of whether either of the first two recommendations are implemented.

a. OFCC should extend the requirements of Revised Order No. 4 to all facilities of State and local government contractors.

b. OFCC should extend the requirements of Revised Order No.

4 to all construction contractors, thus requiring construction contractors to adopt goals and timetables for women and minorities.

(1) In conjunction with making Revised Order No. 4 applicable to all construction contractors, OFCC should rescind approval of all hometown plans and revoke all imposed plans.

(2) OFCC should immediately refer to the EEOC for litigation all trade unions under imposed or hometown plans which have failed to meet plan goals and all trade unions which appear in the future to inhibit the ability of construction contractors to meet their goals under Revised Order No. 4.

c. Revised Order No. 4 should be amended to include specific regulations on affected class relief consistent with Title VII standards, instructions on the proper development of goals and timetables, and requirements that contractors conduct separate analyses of each major minority group, by sex, and of white women as a group.

d. OFCC should adopt the Guidelines on Sex Discrimination of the Equal Employment Opportunity Commission.

4. Regardless of whether either of the first two recommendations is implemented, OFCC should develop reporting requirements for all Federal contractors to ensure the regular collection of information necessary for determining compliance with the Executive order.

a. At a minimum, a reporting format should be required to be submitted annually by all nonconstruction contractors which shows the contractor work force by job title, cross-tabulated by race and sex, the contractor's numerical goals or objectives for the previous year, and the number of job vacancies filled during the year by each race, ethnic, and sex group. OFCC should require that the contractor circulate these reports among all of its employees as an aid for assuring accuracy in reporting.

b. Construction contractors should be required to submit reports similar to those currently required but revised to cover the contractor's entire work force.

RECOMMENDATIONS

Department of Labor (DOL)

Equal Pay Act (EPA)

1. DOL should strengthen the authority and responsibilities of the Wage and Hour Administrator.

a. The Administrator should monitor implementation of equal pay provisions in the regional and area offices.

b. The Administrator should utilize special field representatives to monitor and inspect all activities of regional and area offices on a continuous basis.

2. Since the scope of the Equal Pay Act has been substantially expanded since 1963, DOL should greatly increase the number of compliance officers assigned to its enforcement.

3. DOL should assign at least one senior level official to each regional office whose sole responsibility would be enforcement of the Equal Pay Act. That staff person would not only conduct investigations but would provide assistance to other regional and area office personnel working on EPA.

4. DOL should immediately revise sections of its Interpretative Bulletin and Field Operations Handbook concerning pension plans, fringe benefits, maternity leave, and training programs so that they are in accord with the positions of the Equal Employment Opportunity Commission.

5. DOL should issue new guidelines which provide adequate guidance on how compliance is to be achieved for categories of employees protected by the 1972 and 1974 amendments, such as those with professional,

technical, or administrative positions and State and local government employees.

6. DOL should adequately define what constitutes a bona fide merit or seniority system such that those systems cannot be used as an excuse for the failure to provide equal pay in situations in which substantially equal work is performed by women and men.

7. DOL should instruct compliance officers to prepare a full written report even in cases in which they believe that there is no apparent equal pay violation.

8. DOL should require that all employees be notified of a DOL-initiated equal pay investigation of their employer, and of their rights thereunder.

9. DOL should improve its coordination of EPA matters with other Federal agencies which enforce laws prohibiting sex discrimination so as to ensure the development of consistent policies and the effective utilization of enforcement resources.

Chapter 5

RECOMMENDATIONS

Equal Employment Opportunity Commission (EEOC)

1. With the exception of the Chairman, specific responsibilities should be developed for the EEOC Commissioners.

2. EEOC should be reorganized so that the Executive Director has full line authority over all staff components of the agency with the exception of the Office of the General Counsel.

3. EEOC should revise its personnel system and methodology to ensure that staff vacancies are filled expeditiously.

4. Special priority should be placed on the processing of complaints against State and local governments. Staff units should be established in EEOC regional offices to consolidate and process complaints against State and local governments.

5. Pre-investigative analysis of incoming complaints should be the responsibility of staff of the same grade level as investigators.

6. All complainants whose complaints have been pending for more than 180 days without successful conciliation should be notified of their right to bring a private lawsuit, unless their complaints have been designated for EEOC litigation or consolidated for a pattern or practice action. Priority should be given to organizing panels of private attorneys who will represent these complainants for realistic fees. Where such attorneys are not available, EEOC should assist complainants in petitioning for court-

appointed counsel.

7. EEOC should routinely do followup reviews of at least 25 percent of its conciliation agreements. Violations which cannot be corrected on an informal basis should be referred to the Office of the General Counsel for court action.

8. Individual charges of discrimination should continue to be deferred to approved State and local fair employment practices agencies. Complainants should be permitted to file objections to local agency findings.

a. EEOC shold periodically evaluate each agency to which it defers to ensure that the work product of the agency is consistent with EEOC's standards.

b. In order to promote adequate enforcement by State and local agencies, EEOC should be appropriated sufficient funds to subsidize such agencies according to the number of Title VII cases processed.

9. EEOC should concentrate its efforts on attacking systemic discrimination by initiating more enforcement actions against major employers and industry leaders.

a. The Office of the General Counsel should give priority to attacking systemic discrimination by filing more cases against major national and regional respondents. It should utilize its authority under Section 707 of the Act to file suits against entire industries.

b. The National Programs Division should be expanded and top management should give its activities more aggressive support. Similar units should promptly be established in the regional offices to consolidate and process charges against major regional respondents. Such units should be allocated 50 percent of field resources.

10. The Office of the General Counsel should work closely with field enforcement staff in identifying incoming complaints with good litigative potential. Attorneys should oversee the investigation of these complaints to assure that documentation is adequate for litigation.

11. In order to facilitate cooperation between the staff of the Office of the General Counsel and the regional and district office staff, the litigation centers should be abolished and a branch of the Office of the General Counsel established in each regional office.

12. The Commissioners should utilize the data which EEOC collects on the participation of minorities and women in the work force to target major employers, labor unions, and employment agencies in determining when to file Commissioner Charges. Since Commissioner Charges are potentially useful tools against systemic discrimination, increased use should be made of them, especially with regard to major national and regional respondents and respondents such as employment agencies, against which relatively few complaints are received.

13. EEOC should include representatives of affected classes of employees in negotiations for future consent decrees. The inclusion in these agreements of provisions which seriously limit the ability of employees to obtain private legal relief should be avoided. EEOC should allocate sufficient staff resources to assure that compliance with consent decrees is systematically monitored.

14. EEOC should not enter into voluntary agreements which do not impose the same requirements and standards as its conciliation agreements and consent decrees and are not fully court enforceable. Since the standards

for voluntary agreements would then be the same as for conciliation agreements and consent decrees, responsibility for them should be transferred to the Office of Compliance and the Office of the General Counsel. The function of the Office of Voluntary Programs should be to provide technical assistance to employers.

Chapter 6

RECOMMENDATIONS

Equal Employment Opportunity Coordinating Council

1. The Council should be abolished.

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C. 20425

STAFF DIRECTOR

015356E

JUL 28 1975

JUL 14 1975

Honorable John Dunlop
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

This is in response to your July 7, 1975 letter to me enclosing a further analysis of the chapters of our Enforcement Effort report that concerned the Department of Labor's contract compliance and Equal Pay Act programs. You urged that the analysis be reflected in our report.

As you know, we sent a draft of chapters 3 and 4 of this report to the Department of Labor on March 28, 1975. The Department furnished us with its comments on April 24, 1975. There was no indication in that letter that additional comments would be forthcoming. The response, as appropriate, has been incorporated into the report. The draft report was sent to the printer on June 20, 1975, after all agency comments had been received and incorporated.

On July 9, 1975 we received your additional comments. Had this response been sent to us earlier we would have incorporated it in the report. Our system of soliciting the critical review of our reports by agencies prior to publication is designed to make our reports as fair and accurate as possible. We regret that we were not able to include this new material.

Nevertheless, the full Commission reviewed each of your comments. We will issue an addendum to our report which will include your most recent analysis of our report and the Commission's comments on the points you raised. This addendum will be printed and distributed with the report when it is released.

We appreciate your assistance in this matter and hope that our report contributes to the achievement of equal employment for all Americans.

Sincerely,

JOHN A. BUGGS
Staff Director

July 7, 1975 Response of the Department of Labor

and

July 14, 1975 Comments of the U.S. Commission on Civil Rights
on that Response

ADDENDUM TO:

The Federal Civil Rights Enforcement Effort--1974

Volume V--To Eliminate Employment Discrimination

Page 233

DOL

The reference to delegation "to contracting Federal agencies" to enforce contract compliance regulations, should more accurately refer to compliance agencies.

USCCR

The Commission concurs.

Page 235

DOL

The final footnote states that there is no basis in the Executive Orders for OFCC's recent exemption for religiously oriented, church-related colleges and universities, 41 CFR 60-1.5, 40 FR 13218 (March 25, 1975). However, taking Section 201 and Section 204 of the Executive Order together, it is our belief that a religious limitation is not an exemption per se, but rather is an explanation of the meaning and application of the EEO Clause. But even if it is considered an exemption, it reflects a desire to be consistent with Section 703(e)(2) of the Civil Rights Act of 1964, as amended, which is an expression of what Congress has deemed to be a matter of national interest within the meaning of Section 204.

USCCR

The Commission has considered this comment and still believes that there is no basis in the Executive Order for such an exemption.

Pages 237-38

DOL

The discussion of "numerical goals and timetables is an inaccurate summary of 41 CFR 60-2.11, required utilization analysis, since underutilization in paragraph (b) is directed at job groups, rather than job titles, and remedial goals must be established for each group in which underutilization exists. 41 CFR 60-21.11; 60-2.13, 60-2.23, Section XII, Standard Compliance Review Report, Federal Register, July 12, 1974. However, Section B of the Standard Compliance Review Report does state: "Where certain job titles within a given job group show an inordinate and consistent absence of minorities or women in relation to their availability, the contractor may be required to establish and set forth specific goals and timetables for these job titles separately from the goals for the job group of which they are a part." Reference should also be made to the distinction between ultimate goals and annual rates of hiring and promoting minorities and women until the ultimate goal is reached, along with the need for percentage as well as numerical goals.

USCCR

The Commission notes that on July 12, 1974 (39 Fed. Reg. 25654), the Department of Labor amended the definition of work force analysis in its regulations as follows:

> § 60-2.11 Required utilization analysis.
>
> (a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision.

Page 242

DOL

The Commission's reference to these consent decrees in footnote 728 does not give OFCC proper credit for backpay in those instances. The statement that no agency has ever been permitted to begin the show-cause procedure when a contractor has refused a backpay order, citing an interview with the OFCC Director, July 23, 1974, is inaccurate. We note, for example, that ERDA (formerly AEC) began this procedure for backpay deficiencies against Kerr Glass Company.

USCCR

The Commission notes that the example given occurred on April 7, 1975. Letter from Marion Bowden, Director, Office of Equal Opportunity, Energy Research Development Administration, to W. A. Kerr, President, Kerr Glass Company, Apr. 7, 1975.

Pages 242-43 including footnote 732

DOL

The Department strongly objects to the implication that the Solicitor's Office frustrated the program because it prepared a discussion draft memorandum in 1973 on backpay which took a less expansive view than the March 1975 Federal Register proposal.

Pages 252-53

DOL

Cancelling or terminating contracts and passing over contractors for new or additional contracts without hearings are subject to due process/procurement law considerations in addition to the specific provisions of the Executive Order and the regulations. See e.g. Crown Zellerbach vs. Wirtz, 1 FEP Cases 274 (DCDC 1968).

USCCR

The Commission concurs.

Page 254

DOL

The first footnote incorrectly states that OFCC regulations for nonconstruction contractors do not require that a show-cause notice be issued upon the contractor's failure to meet its goals. See 41 CFR 60-1.28; 60-60.7; Standard Compliance Review Report, XII goals and timetables. The footnote should be revised to indicate that show-cause notices for failure to make good faith efforts to meet the contractor's goals and timetables apply to both construction and nonconstruction contractors.

USCCR

The Commission concurs but notes that OFCC regulations appear to provide that a failure of a construction contractor under an imposed plan to meet its numerical objectives automatically shifts the burden of coming forward with evidence to the contractor. For example, the Camden imposed plan [41 C.F.R. § 60-10.30(b)(1974)] provides that "...the contractor's failure to meet its goals shall shift to him the requirement to come forward with evidence to show that either he or his union... has made every 'good faith' effort (as described in 5 above) to meet such goals." OFCC regulations do not require such a shifting of the evidentiary burden upon a failure by nonconstruction contractors to meet their numerical objectives.

Page 269

DOL

The new OFCC/EEOC Memorandum of Understanding does not require all Executive Order complaints to be referred to EEOC. The intent of the signatories was that affected class discrimination complaints would still be handled through OFCC and the compliance agencies.

USCCR

The Commission notes that the Memorandum of Understanding between the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance provide as follows:

10. Complaints filed with OFCC shall be deemed charges filed with EEOC and OFCC shall promptly transmit such charges to the appropriate EEOC District Office.

Page 275

DOL

OFCC and the compliance agencies are aware of those contractors which have the greatest employment opportunities for minorities and women. (The Revised McKersie System is discussed on page 261 of the report.) As to the question of contractor universe, OFCC is negotiating a contract with Dun and Bradstreet for a comprehensive Government contractor list.

Page 286

DOL

During FY 75, OFCC is receiving coding sheets corresponding to approximately 90 percent of the reviews conducted by the compliance agencies. Through the technical assistance provided by the agency teams, the rejection rate has also declined.

Page 294

DOL

A majority of the compliance agencies review at least 20 percent of their assigned universe annually. The 20 percent figure is a minimum goal for each agency. While some agencies currently review a lesser percentage, OFCC's budget recommendations are based on a higher percentage of reviews and it is expected that within a few years, all agencies will reach the 20 percent level.

Pages 298-99

DOL

As of February 1975, ten companies had been debarred. Six of the ten were small specialty construction contractors. The first nonconconstruction contractor McNikol-Martin Company was debarred in February 1975. The first footnote should be changed by adding Edward A. McGuire, Philadelphia, (July 1, 1972) to the list and putting McNikol-Martin Company with the service and supply list. The second footnote should note that Edward McGuire was reinstated on December 31, 1973.

Pages 301-02

DOL

The statements on required utilization analysis are not an adequate refection of 41 CFR 60-2.11. Goals should be established by job group. See comments on pages 215-216, supra.

USCCR

As the Commission noted above, the section of the regulation referred to requires a utilization analysis by job title.

Pages 302-03

DOL

In analyzing Section 718 of the Civil Rights Act of 1964, as amended, OFCC can act to revoke approval of an affirmative action plan after the 45-day period if a hearing is provided.

Pages 303-04

It is inaccurate that the statement that Revised Order No. 4 did not include instructions to the agencies on procedures to follow in evaluating and reviewing AAP's. See 41 CFR 60-2.14 and Subpart C of Revised Order 4. Order 14 was first issued in January 1972, that Order as well as subsequent revisions clearly specified the information that contractors were required to submit.

USCCR

The provision in Revised Order No. 4 which is referred to gives examples of affirmative action steps and requires compliance agencies to determine to what extent contractors have included these steps in their plans, but it does not contain instructions on the evaluation procedures compliance agencies are to follow in making this determination. The inadequacies of earlier versions of Order No. 14 are discussed in the report. Thus, the Commission believes that OFCC failed to give adequate guidance to compliance agencies on proper review procedures for a considerable period of time.

Page 306

DOL

There is a failure to mention the earlier version of Revised Order 14 issued January 23, 1973, and codified and published in the Federal Register on May 21, 1973, as a final regulation but with opportunity for public comment.

USCCR

The Commission refers to this version in footnote 961 at 311.

Page 323

DOL

The statement that as of March 1975 there was no OFCC policy on affected class relief is overbroad in light of OFCC guidance and/or participation in individual cases, etc.

Page 330

DOL

The Commission's criticism of HEW, including the statement that "compliance programs flagrantly violating the law, such as HEW's program for institutions of higher education" offers no specific citations except a separate Civil Rights Commission study.

Pages 335-38

DOL

Beginning at page 335, the report does not give adequate recognition of the Department's lead role in the AT&T settlement nor the dimensions of that settlement. With regard to the absence of compliance reviews of AT&T at page 314, it should be noted that during part of that period, until January 1973, negotiations were still in progress towards full resolution of the case, including development of the model AAP for the entire Bell system. Under the decree, AAP's were to be submitted to OFCC for approval within 120 days from the date of the decree. OFCC was then given 90 days to approve or disapprove these AAP's. Only after the latter date were compliance reviews to begin.

Page 345

DOL

Sex discrimination under Executive Order 11375 has been prohibited since 1967, not 1970.

USCCR

Page 347

DOL

It should be noted that the reason that contractors under Part II bid conditions are not required to submit an AAP is because Part II is itself and AAP. Also the final footnote should be revised to state that the Appendix submitted by a bidder under an imposed plan is itself an AAP and no additional document is therefore necessary; this should also be reflected at page 351.

USCCR

The Commission concurs.

Page 348

DOL

Even if the contractor's trade is meeting its trade-wide goals if the contractor, itself, discriminated in accepting minority applicants or referrals, this would be a violation of the EEO clause and sanctions may be pursued.

USSCR

However, absent the filing of a complaint by an individual minority person who would bring such discrimination to the attention of the government, the contractor would be presumed to be in compliance and therefore not reviewed.

Page 348

DOL

The Commission takes an overly restrictive view of the Department's July 19, 1974, Directive on State and local EEO requirements for Federally-assisted construction. As indicated in dispositions under the January 1974 regulation, 41 CFR 60-1.4(b) (2), since formally rescinded as a result of the New York litigation, the Department did not oppose meaningful State and local EEO requirements for Federally-assisted construction.

Page 354

Second footnote: Show-cause notices are not automatic for failure to meet Part II and imposed plan goals.

USCCR

The Commission concurs; however, see response to DOL comment regarding p. 254.

Page 356

DOL

41 CFR 60-1.40, for the development of written AAP's applies to contractors with 50 or more permanent employees. Since most construction employers do not maintain large permanent work forces, this section would normally not apply to construction. Moreover, this 1968 provision involved procurement law problems involving specificity, as evidenced by the Comptroller General's rejection of the first Philadelphia Plan, 48 Comp. 326 (1968) and his recent rejection in July 1974 of the Illinois State FEP requirements. Greater specificity was therefore created through issuance of Order 4, for nonconstruction, and the second Philadelphia imposed plan and subsequent imposed or negotiated plans. See Nash, Affirmative Action under E.O. 11246, 46 NYU L. Rev. 225, 234 (1971).

USCCR

The regulation, 41 C.F.R. 60-1.40 (1974), provides as follows:

> § 60-1.40 Affirmative action compliance programs. (a) Requirements of programs. Each agency or applicant shall require each prime contractor who has 50 or more employees and a contract of $50,000 or more and each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and a subcontract of $50,000 or more to develop a written affirmative action compliance program for each of its establishments.

The term "employee" is nowhere defined in the regulations to mean only permanent employees. See 41 C.F.R. 60-1.3.

Page 358

DOL

Final footnote: In Seattle, new Part II bid conditions were issued in the summer of 1974. The Seattle-King County Building Trades Council in September 1974 later withdrew from the 1973 plan. Accordingly, Seattle trades are now under Part II bid conditions.

Page 360

DOL

The New York Plan is no longer an approved hometown plan since November 1974. Part II bid conditions are now in effect.

Page 364-65 and 373

DOL

OFCC does attempt to evaluate hometown plan goals in light of hiring and promotion opportunities and minority availability. In some instances, accurate statistics are unavailable.

Pages 375-85

DOL

The statement that Hometown Plans are a failure does not take into account the gains that were made in minority employment. While a majority of the plans failed to fully achieve their goals, a substantial number of minorities were placed. In the review of the construction compliance program currently underway, alternatives to the hometown plans are being considered.

Page 384

DOL

The idea of using the number of debarments to backup the statement that the construction compliance program has suffered from a near absence of enforcement is not valid. Since debarment is the ultimate sanction, compliance agencies utilize it in only the most extreme circumstances. Out of an estimated construction contractor universe of 50,000, the various compliance agencies reviewed approximately 7,900 during FY 1973, 8,100 during FY 1974 and expect to conduct more than 12,000 reviews during FY 1975.

Pages 384-85

DOL

OFCC has been criticized for failure to refer cases of union interference to the Justice Department. Such a referral was sent on November 18, 1974, with regard to Operating Engineer Local No. 701, Portland, Oregon.

General Comment:

In its evaluation of the program the Commission does not give adequate recognition to the following:

1) The Department of Labor's lead role in the AT&T and the steel settlements;

2) Executive Order enforcement through court actions brought by the government for specific performance of the EEO clause.

Page 588

The final paragraph should indicate that under Order 4 goals are normally by job groups, not job titles.

Page 595 (Final footnote):

The Labor Department staff usually included a representative of the Solicitor's Office with regard to the Uniform Testing Guidelines meetings.

Pages 405-406

DOL

The discussion of Brennan v. Corning Glass Works is not accurate. The reason women were excluded from the better paying night-shift job was not because the employer maintained segregated seniority lists, but because New York law prohibited women from working after midnight. When the night shift was finally opened to women in 1966, there were not, as the statement suggests, any restrictions on women moving into the night job. Indeed, when suit was brought by the Department of Labor in 1969, approximately one-half of the night-shift jobs were occupied by women and these women were paid the same rate as the men. The issue in Corning was whether the company could--after integrating the jobs--continue to pay the day-shift employees (which now included a number of men) less than the night-shift employees. The Department of Labor argued that it could not, contending that the differential was originally based on sex and that therefore the day-shift rate had to be increased to the night-shift rate (less the plant-wide shift differential). The Department rejected the Company's argument that the Equal Pay Act violation had been cured when Corning integrated the day-shift job and opened up the night-shift job to women on an equal basis with men, pointing out that the purpose of the Equal Pay Act was to eliminate dual rates based on sex, and that the day-shift job, which still employed primarily women, was being paid a lower rate because it originally had been a female job. The Supreme Court agreed and ordered that the differential be eliminated by increasing the rate for the day-shift job. The seniority issue referred to in the Court's opinion concerned an interim change under which the Company instituted on rate for day-shift employees and for night-shift employees hired after January 20, 1969, and another higher rate for night-shift employees (both men and women) who were hired before January 20, 1969--which rate was to be paid whenever they worked on the night shift, regardless of whether they had ever worked on the night shift prior to that date. The Department of Labor argued that the maintenance of this higher rate for some employees, and not for others, perpetuated the sex-based wage differential that had previously existed and was thus unlawful. Again, the Supreme Court agreed.

USCCR

The Commission recognizes that the Department of Labor's expanded explanation of this case is useful.

Pages 408

DOL
The discussion of coverage on page 379 is incomplete. It would be more accurate to state as follows: "Generally, the provisions of the Equal Pay Act apply to employees who are themselves engaged in commerce or in the production of goods for commerce (inwhich event the size of the employer is irrelevant) or who are employed by an enterprise which has (1) at least some employees engaged in commerce or in the production of goods for commerce or in handling goods which, although purchased locally, have moved in commerce and (2) an annual gross volume of sales of not less than $250,000. This sales test does not apply to construction enterprises, laundries, schools, hospitals or institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective--all of which are covered regardless of size. The activities of all public agencies are also covered. Moreover, although small retail establishments having an annual sales volume of less than $250,000 are usually exempt from the Act's equal pay provisions, this exemption does not apply if the establishment receives 50 percent or more of its annual sales from interstate sources.

USCCR
The Commission concurs in DOL's elaboration of the statute.

Page 414

DOL
The Secretary was not authorized to recover liquidated damages in a Section 216(c) suit until the 1974 FLS Amendments, which went into effect on May 1, 1974. Therefore, the first sentence of the last paragraph should be revised to read: "Earlier versions of Section 216(c) placed time consuming requirements in the way of the Secretary's use of the section,and it limited the Secretary's monetary recovery in such actions to the amount of unpaid minimum wage and overtime compensation.

USCCR
The Commission concurs in DOL's elaboration of the statute.

Page 417

DOL
The Equal Pay Act requires not only the restoration of back wages, but, as pointed out in the discussion of Corning Glass, the equalization of the rates for the two jobs by raising the lower rate to that of the higher.

This illustrates a major distinction in the approach taken by the Department of Labor and the Equal Employment Opportunity Commission. The EEOC is concerned primarily with opening up the higher paying job to the women; the Department of Labor, because the Equal Pay Act is a wage act, is concerned with increasing the wage rate for the once female job, although that job may now be held by men as well as by women, and although a number of women may now occupy the formerly all-male job.

USCCR
The Commission concurrs in DOL's elaboration of the statute.

Page 420

DOL
The first paragraph on page 391 would appear incorrect. The Solicitor does not need clearance from the Under Secretary before filing lawsuits. The Secretary, through a Departmental General Order, has assigned to the Solicitor the responsibility for making "the determination in each case whether (legal) proceedings are appropriate," and for performing "all necessary legal services" for the Department.

USCCR
The Commission's accepts DOL's clarification on this point.

Page 425

DOL
National concern cases are not necessarily tried from Washington, as the first paragraph on page 393 would suggest. Such cases must be authorized by Washington, as must any case involving novel or difficult issues; the purpose of such clearance is to assure uniformity in our interpretative and enforcement positions, and to allocate our resources among the regional offices so that they do not engage in duplicative actions against the same company.

Also, the last paragraph may erroneously suggest that the Regional Solicitors are under the line control of the Regional Director; in fact, they are under the line control of the Solicitor who, with the knowledge and consent of the Secretary, has authorized the Regional Solicitors to act for him in the institution and handling of certain type of cases.

The statement that the Regional Solicitor's offices allocate approximately 25 percent of staff time to EPA enforcement is not correct. They allocate 25 percent of the time they spend on the Fair Labor Standards Act and Age Discrimination in Employment work; this work constitutes 50 percent of their time; the other 50 percent is devoted to enforcement of the Occupational Safety and Health Act, the Manpower programs, Veterans Reemployment Rights, Labor Management Laws, etc. Of the time spent on FLSA and ADEA work, 25 percent is spent on EPA, or 12 percent of their total time.

USCCR
The Commission accepts this statement by the Department of Labor.

Page 431

DOL
There are several Equal Pay Act cases which recognize the "great weight" to be given to the Department's Interpretative Bulletins, which could be added to the district court Title VII case cited in footnote three on page 399. See, e.g., Hodgson v. Miller Brewing Company, 457 F.2d 221, n 11.

Page 434

DOL
The discussion of maternity benefits reflects a misconception of the Department's position. The purpose of 29 CFR 800.100 is to exclude from wages certain payments which might otherwise be used to reduce the cash payments made to employees of a particular sex. Thus, if an employee travels on an expense allowance, or if an employee is given special maternity benefits, such payments cannot be used to justify lower wage payments to these employees. This does not relieve the employer from having to provide equal benefits, or to provide benefits based on equal contributions.

USCCR
The Commission welcomes this most recent interpretation by DOL concerning maternity benefits.

Page 435

DOL
The treatment of the training issue is, in our view, quite distorted since, as the second footnote on page 403 recognizes, the Department has vigorously contended that training programs which discriminate against women cannot be used to justify a wage differential, and has obtained decisions on this point from three separate Courts of Appeals. Thus, in addition to the Fifth Circuit cases cited in the draft, see also Hodgson v. Fairmont Supply Co., 454 F.2d 490 (C.A. 4), and Hodgson v. Security National Bank of Sioux City, 460 F.2d 57 (C.A.8).

USCCR
The Commission welcomes the comment by DOL, but recommends that the Department make its guidelines fully consistent with the position it has taken in court.

DOL

The Committee referred to in the first footnote on page 413 is the Joint Review Committee and not the Joint Review Council

USSCR

The Commission accepts this contribution.

Page 448-449

DOL

The discussion on these pages reflects a general misconception as to the policies of the Solicitor's Office and as to the function of the Department of Labor in the enforcement of the Equal Pay Act. First, there are no absolute dollar cutoffs, as suggested on page 416, and the suggestion in a public document that there are such cutoffs can only adversely affect the Department's ability to secure voluntary compliance and restitution of unpaid wages from noncomplying employers. The amount of money withheld is, of course, a factor which the Solicitor's Office considers in selecting cases for litigation. The Department has 70 attorneys assigned to the enforcement of the Fair Labor Standards Act. the Equal Pay Act and the Age Discrimination in Employment Act; we currently bring over 1,800 law suits under these three Acts each year, and, with out limited staff, it is not possible to substantially increase that number. Accordingly, the Regional Solicitors, in selecting which cases to file, must be guided by interests pertinent to the Secretary's broad statutory reponsibility. Among the factors which are considered are the type of industry involved (since the Department, in order to secure voluntary compliance, must have suits pending against all types of employers and industries), the employer's past record, the nature of the violations (e.g., whether the violations are willful or flagrant), the number of individuals affected by the violations, the current compliance or noncompliance of the employer, the importance of the legal issues and the need to establish precedents in certain unsettled and novel areas, etc. The amount of money due is also a factor, but only if the employer has come into compliance with the Act's requirements. Despite this need to be selective, the Department, in appropriate cases, has brought suit where the amount of unpaid wages was as little as $200.

The suggestion for an appeal process is not practical in view of the Department's limited resources and would, in fact, impose a further strain on these limited resources. Congress never intended the Department to assume the full burden of enforcement under the FLSA, EPA and ADEA, and, for this reason, Section 16(b), which established a right of individual suit (unlike many other federal statutes, which can only be enforced by the Government), has always been recognized as crucial to the full enforcement of these laws. The function of the Solicitor's Office is to establish judicial precedents so that 16(b) suits are a feasible and realistic alternative to suit by the Department; the Department also notifies employees of their 16(b) rights, so that they are aware of their rights. In addition, 16(b) makes the payment of a reasonable attorney's fee mandatory where the employee's claim is sustained.

USCCR

The Commission recognizes the factors identified by the Department of Labor in its response.

DOL

The statement in footnote 1393, page 449, concerning the settlement of back wage claims, is also inaccurate. The Department has always taken the position that back-wage claims cannot be waived, and that full restitution is required. This does not, however, mean that the Department always recovers the full amount computed; but the reason for not doing so is based on a legal consideration. For example, in an equal pay case, it might be determined that a particular male coworker is an inappropriate counterpart because of greater seniority, in which event the proper rate to be paid to the female employee might be computed on some other appropriate basis.

USCCR

The Commission concurs with the above statement.

Page 453

DOL

It is not accurate to state that "most" cases are returned to the area office for reinvestigation. Reinvestigations are usually only required in the more complex cases; obviously, because of the complex nature of most equal pay cases, a number of these files--but not most of them--are returned for further development.

Page 454

DOL

The Wage and Hour compliance officers are well trained and generally do an excellent job in describing the duties of the employees and in otherwise obtaining the evidence necessary to establish job equality. Indeed, the compliance officers have appeared in some cases as expert witnesses. See, e.g., Shultz v. Hayes Industries, Inc., 19 WH Cases 447 (N.D. Ohio, 1970). The only cases where the Solicitor's Office has hired job evaluation experts is where the bona fides of the employer's job evaluation plan is being challenged, or in some particularly complex industrial process.

Page 457

DOL

The statement that the Solicitor's authority to bring an action for "liquidated" damages is seldom invoked is based on the mistaken assumption that the Solicitor has had the authority to seek such damages for a number of years. In fact, as discussed earlier, this authority did not exist until the 1974 Amendments. Nor is it accurate to state that the Solicitor's office views liquidated damages as punitive. On the contrary, it has argued and the Supreme Court has held, that such damages are "not penal in ***nature," but are remedial, "constitut(ing) compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages," Brooklyn Bank v. O'Neil, 324 U.S. 697,707; Overnight Motor Co. v. Missel, 316 U.S. 572.

USCCR

This Commission accepts this comment of the Department of Labor.

Page 460

DOL

As already indicated (page 435), it is not correct to state that the Department of Labor and the EEOC differ on the question of permissible training programs.